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NEW JERSEY EQUITY REPORTS.

VOLUME XXXIII.

STEWART, 6.

ERRATA.

Pillsbury v. Kingon, 300 (24), for “part” read “fact.”

Mut. Life Ins. Co. v. Sturges, 330 (9), for “H. C. Pitney”
read “Theo. Little.”

REPORTS

—OF—

CASES DECIDED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

The Court of Errors and Appeals,

OF THE

STATE OF NEW JERSEY.

JOHN H. STEWART REPORTER.

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EX-OFFICIO JUDGES.

HON. THEODORE RUNYON, CHANCELLOR.

“ MERCER BEASLEY, CHIEF JUSTICE.

“ DAVID A. DEPUE,

“ BENNET VAN SYCKEL,

“ EDWARD W. SCUDDER,

“ MANNING M. KNAPP,

“ JONATHAN DIXON,

“ ALFRED REED,

“ WILLIAM J. MAGIE,

“ JOEL PARKER.

} Associate Justices
of the
Supreme Court.

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“ JOHN CLEMENT,

“ FRANCIS S. LATHROP,

“ AMZI DODD,

“ CALEB S. GREEN,

“ MARTIN COLE.

CLERK.

HENRY C. KELSEY, Esq.

NOTE.

This volume contains the opinions delivered in the Court of Chancery and Prerogative Court, at October, 1880, and February, 1881, Terms, and also those on appeal, in the Court of Errors and Appeals, at November, 1880, and March, 1881, Terms.

By the Chancellor's direction, the opinions in the following cases have not been published: *Weber v. Weber*; *Menagh v. Sharp*; *Coryell v. Moore*.

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C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF

THE STATE OF NEW JERSEY,

OCTOBER TERM, 1880.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

EUGENE S. DOUGHTY

v.

THE BOARD OF COMMISSIONERS OF SOMERVILLE.

Complainant moved back a fence along a public street, and threw out a strip of land six feet in width, thereby rendering the street more dangerous for travel, by throwing a ditch running along the fence nearer the centre of the street. Thereupon the street commissioners began to cut away part of the strip of land, in order to alter the ditch and render the passage of the street safer.—*Held*, that complainant could not enjoin the acts of the commissioners in that matter, because—

(1) If he had dedicated the strip of land, the commissioners had authority (under the act for “the improvement of Somerville”) to improve it; and

(2) If he had not dedicated it, such injury was not irreparable, and he could obtain adequate redress at law.—*Held*, also, that since such commissioners had power to remove encroachments on highways only by resolution or ordinance, their threatened removal of complainant’s fence so as to add to

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such highway an additional strip of land from five to nine feet wide because of an alleged encroachment to that extent, without any official direction by resolution or ordinance, and without first ascertaining whether there was an actual encroachment, the complainant and his grantors having been in quiet possession of the premises for thirty years, might be enjoined.

Bill for injunction. On bill and answer. Motion for preliminary injunction.

Mr. A. A. Clark, for complainant.

Mr. J. J. Bergen, for defendants.

THE CHANCELLOR.

The complainant prays an injunction to restrain the defendants from tearing up a ditch and drain in a street known as Raritan road, along the front of his property in Somerville, and from in any way intermeddling with the ditch or drain, and from removing the fence in front of his premises. The complainant's property is a very valuable one, handsomely improved for private residence, and has a front of about eight hundred feet on the road. Within a year past he removed his road fence about six feet back. Before its removal the fence stood on the edge of a ditch, which was at the side of and in the road. The removal of the fence appears to have made the ditch dangerous to public travel, and the defendants set about altering and improving it, and in so doing proposed to cut away part of the six feet thrown out by the complainant, so that the side of the ditch next to his property will be from two to three feet nearer to that property than it was before. They also propose and intend to remove the complainant's fence on the road from five to nine feet back along the whole line. They claim that he and those under whom he derives his title, have unlawfully encroached to that extent upon the road. If they carry this design into effect, they will render it necessary for him to remove those of his ornamental trees which stand on the strip that they propose so to reclaim for public use. When the bill was filed the defendants

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had already done part of their intended work upon the ditch. It would appear, by the statements of the bill, that the complainant gave the six feet thrown out as before mentioned to the public. The defendants are empowered by the statute from which they derive their authority (*P. L. of 1863 p. 479*) to cause to be constructed, enlarged, repaired and extended, any culverts, sewers, drains or ditches in or along any of the public streets or roads within the limits of the town. If the complainant has dedicated the six feet to the use of the public as part of the street (he says he is willing that it should be used as a sidewalk), the defendants have a right to alter the ditch as they propose. But if not, and the strip thrown out is the complainant's private property, the injury complained of in this connection is not irreparable, and he can obtain adequate redress at law, and, under the circumstances, he is not entitled to the intervention of this court by injunction. *Cross v. Morristown*, 3 C. E. Gr. 305.

But as to the proposed removal of the fence the case is different. The defendants are empowered by the statute before referred to, by resolution or ordinance, to prevent and cause to be removed all obstructions in the streets or roads of the town; but they do not claim to have passed any resolution or ordinance on the subject of the alleged encroachment. They admit that they intend to remove the fence so as to regain for the road from the land within it claimed by the complainant to be his private property, and which it would appear has been claimed by him and those under whom he derives his title, as their private property for at least thirty years, a strip of from five to nine feet in width along his entire front. They say in their answer that they are willing that the true location of the street should be ascertained by surveys and measurements to be made by a competent civil engineer, to be agreed upon by the parties or to be appointed by this court. It does not appear that they have taken any steps to ascertain whether the alleged encroachment in fact exists. Indeed, it seems not improbable that they are in error as regards the history and origin of the road in front of the complainant's property. The complainant, under the circum-

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stances, is entitled to the aid of this court by its injunction to protect him against the threatened removal of his fence. *Cross v. Morristown, ubi supra*; *Varick v. New York*, 4 Johns. Ch. 53. There will be an injunction accordingly.

JOSEPH K. WELLS

v.

MARIE LOUISE WELLS.

1. The act of 1880 (*P. L. of 1880 p. 52*), "that in all civil actions, in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; *provided, nevertheless*, that this supplement shall not extend so as to permit testimony to be given as to any transaction with, or statement by any testator or intestate represented in said action," does not, by virtue of its provision that any *party* to any action may be sworn, remove the prior statutory disqualification of a husband or wife, in a suit for divorce on the ground of adultery, to testify to anything except the fact of marriage.

2. In a suit by a husband for divorce from his wife on the ground of adultery, a non-resident detective had been employed by the husband, and examined by him in reference to one matter only, and cross-examined by the wife's counsel, after which he left the state.—*Held*, that the court would not order the husband to produce him again for examination by the wife as to other matters; nor would the husband be ordered to produce the correspondence between himself and such detective during the latter's employment by the husband, such letters being in the hands of the detective and not at all under the husband's control.

Bill for divorce *a vinculo*.

Mr. I. W. Scudder, for complainant.

Mr. J. D. Bedle, for defendant.

THE CHANCELLOR.

In the course of the examination of witnesses in this cause, two questions have arisen: One as to the admissibility of the defend-

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ant (the suit is for a divorce on the ground of adultery) as a witness, to disprove the crime charged upon her; and the other as to whether the court will require the complainant to bring again upon the witness-stand, for examination by the defendant in her defence, James Irving, a detective officer, who has been examined as a witness by the complainant, and, having been cross-examined and having signed his testimony, has left the state; and to produce certain documents which, it appears from Irving's testimony, he has in his possession or under his control, being letters from the complainant to him, and copies of his answers thereto. By the third section of the act concerning evidence (*Rev. p. 378*), it is provided that parties may be witnesses in their own behalf, except when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties sues or is sued in a representative capacity, except as subsequently provided by the act. By the fifth section, the husband or wife of a party or other person interested in a suit is made a competent witness for such party or person, and it is provided that he or she may be compelled to give evidence for such party or person, but that nothing contained in the section shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding for divorce on account of adultery, except to prove the fact of marriage, or in any action for criminal conversation, or compellable to disclose any confidential communications made by the one to the other during the marriage. In *Marsh v. Marsh*, 2 *Stew. Eq.* 296, it was held by the court of errors and appeals, construing the act, that in a suit for divorce for adultery, neither husband nor wife is a competent witness to prove or disprove the charge. But it is insisted that by the supplement to the act (*P. L. of 1880 p. 52*), that disability is wholly removed. The supplement provides that in all civil actions, in any court of law or equity, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, however, that it shall not extend so as to permit testimony to be given as to any transaction with or statement by any

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testator or intestate represented in such action. Neither directly nor by implication does this supplement remove the disability imposed by the fifth section of the act. It obviously was intended merely to remove the disability specified in the proviso of the third section of the act. As the act stood when the supplement was passed, a party might be sworn and examined as a witness in his own behalf, provided the other party was not under any legal disability from being a witness, or was not suing or being sued in a representative capacity, and a wife or husband of a party was competent and might be compelled to give evidence in a suit, except that no husband or wife should be competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding for divorce on account of adultery, except to prove the fact of marriage, or in any action for criminal conversation, and should not be compellable to disclose confidential communications made by the one to the other during the marriage. The supplement, while it partially removes the disability of parties which was occasioned by the fact that the adversary sued or was sued in a representative character, goes no further, and does not remove or affect the disability and privileges declared by the proviso of the fifth section. By its terms it is manifestly confined in its operation to the partial repeal of the disqualifying exception just referred to in the third section. The defendant is not a competent witness in the cause to disprove the charge of adultery.

She insists that the court should require the complainant to produce the witness Irving, who resides out of this state, for examination by her in her behalf, and to produce, also, the letters received by Irving from the complainant, and the copies of those written and sent by him to the complainant during the period of his employment by the latter as a detective, in reference to the matter in controversy in this suit. The complainant examined Irving about a certain ring alone, and it is not claimed that the letters are to be used to contradict his testimony in reference to that matter, but they are to be used to show condonation by the complainant of the defendant's adultery, if indeed she was guilty of that offence. That is to say, the defendant asks that the court

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shall not only require the complainant to produce the witness, to be examined by her in her behalf, but shall require him to see to it that the witness produces at the same time, for inspection by her, the letters which the complainant sent to the witness, and the copies of the letters sent by the witness to the complainant. It is not claimed that these letters and copies are in the hands of the complainant or under his control. It is proved that they are in the hands or under the control of the witness. I can see no principle on which this application can be granted in either of its branches. The complainant is not bound to keep his witness in court until the defendant may have determined whether she will examine him in her own behalf or not. If a witness residing out of the state is here to testify for one party, and the other desires to take his testimony in his behalf while he is here, the statute points out a way to obtain it; and, apart from the statute, the court would, on application, effectively aid the party in obtaining the testimony. When a party has kept his witness in court until the cross-examination is ended, he may then suffer him to depart; he is not bound to detain him longer. Nor can he be required to see to it that the witness produces, at the demand of the other party, documents for use by the latter as part of his proof, unless they become so upon legitimate cross-examination of the witness. The application is denied.

KATE C. BOURQUIN

. v.

GORDON M. BOURQUIN.

Proof that a husband and wife have lived separate, and that the husband has not supported his wife, does not establish willful, continued and obstinate desertion, so as to authorize a divorce.

Bill for divorce.

Bourquin v. Bourquin.

THE CHANCELLOR.

This case comes before the court *ex parte*. The bill alleges that the defendant willfully deserted the complainant in July, 1875, and that such desertion has been obstinately continued ever since. The complainant swears that she and her husband boarded together at 55 Sands street, in Brooklyn, on the 12th of June, 1875, and that he then left her, but that she remained there till the 8th of December following. She says he left her without any support, but, in the next sentence, says that he paid her board up to the 8th of December, though he did not live with her from the 12th of June. She says she returned from Brooklyn to her father's house, in Camden, at her husband's solicitation, on the 8th of December; that he said that if she returned to Brooklyn, he would pay her board and all her expenses; that she returned to Brooklyn, and went to board at 193 Prince street; that he came to see the lady of the house, a few days after she got there, about making arrangements to pay her board; that he never came to live with her there, and did not pay her board. Again, she says that in July, 1876, he ceased to support her; that she again left Brooklyn, on the 8th of September, 1876, and returned to Camden, and that she has received no support from him since the 12th of July, 1876. She further says that she has not seen him since September, 1876, and yet, in a former part of her testimony, she seems to testify that she has seen him twice in the street in Brooklyn. In this connection, it may be remarked that her sister says that the complainant has supported herself since she returned home in September, 1876, and adds that she has seen the complainant and defendant together, presumably since that date. Albert Hughes testifies that the defendant left the complainant in the early part of June, 1875, and adds that he does not know that they lived together after that. He subsequently, indeed, says positively that he knows that the defendant has never returned to the complainant, and does not now live with her; but how he has obtained his knowledge on the subject does not appear. In all this testimony there is no proof of desertion. The proof is that the parties have lived separate, and that the defendant has not

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supported his wife since September, 1876. That is not enough. To entitle the complainant to a divorce on the ground of desertion, it must appear that the defendant had willfully, continuously and obstinately deserted his wife for three years before this suit was begun.

The bill will be dismissed.

MARY G. WOOD

v.

GEORGE R. CHETWOOD.

An account of an executrix and her husband, guardian of the share of the daughter of the former, was settled by the daughter (the ward) and her husband thirty-four years before the filing of the bill, which was by the daughter, (whose husband was dead,) for an account of her share. The ground relied on was errors in the account which was settled, and the fact that the daughter was, when it was settled, a minor.—*Held*, that the claim was a stale one, and that, under the circumstances, she was bound by the settlement, notwithstanding her minority.

Bill for an account. On final hearing on pleadings and proofs.

Mr. W. J. Magie, for complainant.

Mr. F. H. Teese and *Mr. C. Parker*, for defendant.

THE CHANCELLOR.

Dr. Oliver H. Spencer, of (then) Elizabethtown (now the city of Elizabeth), in this state, died May 19th, 1824, leaving a widow and three children, Robert D., Mary G. and Susan W. D. He had property both in Louisiana and in this state, and he left two wills—one, the earlier, made in New Orleans, and the other, supplementary and as a codicil thereto, at Elizabethtown. By the former, he gave all his property in Louisiana to his children in equal shares, with gift over in case of the death of all of them

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without issue. By the latter, he confirmed the Louisiana will, and directed that no part of his estate should be sold, excepting two certain lots in Elizabethtown, the sale of which he authorized, but that it should remain as it then was until all his children should have reached the age of twenty-one years. He gave his executors (who were his wife and Peter Kean and Oliver M. Spencer) power to sell those lots and invest the proceeds in stocks, and to sell such parts of his furniture or stock as they might think would not be wanted, and to invest the proceeds of the sales in stocks; and he declared that it was his will that, in case of the remarriage or death of his wife, all his plate and household furniture of every kind should be sold, as well as all his slaves, horses, carriages, farming utensils and stock of every description, and that the proceeds should be invested in stocks. He constituted his wife guardian of the persons and estates of his children, during their minority, and provided that, in case of her death or remarriage, Peter Kean should take her place. After certain restrictions upon his wife as to endorsing, &c., in and while managing his estate, and making provision for the custody of the valuable papers of the estate, &c., he gave direction as to the education of his son, and ordered that he receive, on arriving at his majority, \$1,000 out of his personal estate and one thousand acres of choice land in Ohio, more than his other children. He then gave to his wife, "for her support, and for the purpose of maintaining and educating" his "children during their respective minorities, the use of the whole of his estate, both real and personal," and gave the residue to his children, to be equally divided among them as they should arrive at the age of twenty-one years, or, in case of marriage, at eighteen; and provided that, after such division, his wife should have one-third of the use of his real estate, and the sum of \$600, to be paid to her annually, in lieu of dower and all other demands.

The New Jersey will was proved by the widow and Peter Kean. The other executor never, so far as appears, acted as such. In 1828, Peter Kean died. He never accounted for his administration of the estate. The widow married the defend-

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ant, Dr. Chetwood, July 29th, 1828. Robert D. Spencer died in 1855, leaving children. He received his share of the estate in 1835. The complainant attained her majority April 2d, 1838, and her sister Susan in February, 1840. The complainant was married to William N. Wood, February 22d, 1837. He died in 1865. Susan was twice married. Her first husband was Captain George H. Pegram, and her last Gilbert R. Fleming. He died after the commencement of this suit. Mrs. Chetwood is now dead also. In 1831, Dr. Chetwood was duly appointed guardian of the complainant and her brother and sister. An inventory of the estate of the testator was filed in 1825, by Mrs. Chetwood (then Mrs. Spencer) and Peter Kean. No account was ever filed; but in 1837, a few months before the complainant attained her majority, and after her marriage to Mr. Wood, an account of the amount due her from the executors was given to him, at his request, and a settlement was then thereupon made by him with Dr. Chetwood and his wife, the executrix, of the complainant's share of the estate, and a receipt, under date of August 31st, 1837 (the complainant came of age the 2d of the following April), written beneath the account, and signed by Mr. Wood and the complainant, was given, by which they acknowledged that they had received from Mrs. Chetwood, executrix of Dr. Spencer, and Dr. Chetwood, guardian of the complainant, \$12,957.90, by a transfer of stocks, assignment of bonds and mortgages, and a note and draft, on account of the complainant's share of the personal estate of her father, and that the balance due, stated in the receipt to be \$3,772.14, was to be paid by Dr. Chetwood's giving his bond (to be secured by mortgage) therefor, payable in one year, with interest from that date. That balance was subsequently so secured and duly paid. Like accounts and settlements, with payment, were made with the two other children, Susan and Robert, on their marriage or attaining to majority. In September, 1833, Dr. Chetwood, as guardian of the children, sold part of the Ohio land, in pursuance of authority obtained by him from the legislature of that state. The price obtained was \$9,000. He accounted, in the settlements to the children, for their shares of the proceeds, after deducting

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\$443.62, for the cost of obtaining the law and commissions, &c., paid by him on the sale.

The bill is filed to obtain an account of part of the complainant's share of the estate. It is based on the allegation that the executrix and her husband ought to have accounted to the children for all the income of the estate over and above what was necessary for her and their support and their education, after her remarriage, and that, in the respects and particulars hereinafter mentioned and considered, and some others abandoned on the hearing, the account of 1837 given to Mr. Wood should be surcharged and corrected. The complainant insists that, inasmuch as she was, at the time of the settlement of that account, a minor, she is not bound by it, and that the receipt of her husband could extend no protection to Dr. Chetwood and the executrix beyond the amount actually received. The executrix and Dr. Chetwood, by their answer, deny the allegations of the complainant as to the alleged errors, and resist her claim to an account; and they plead, in the answer, the great lapse of time as an equitable bar. In 1872, about seven years after the death of her husband, the complainant cited Dr. Chetwood to account, in the orphans court of Essex county, as her guardian. He, in December of that year, filed, as his account, a statement of the settlement before mentioned, and alleged that the balance which was then found due from him had been paid. In March following, the complainant filed exceptions to the account, but they were not proceeded upon, and on the 16th of April, 1875, this suit was begun. Soon after the citation out of the orphans court was served on him, Dr. Chetwood left the country and went to France, where he has ever since resided and remained.

To consider the objections made to the account of 1837. Though others are stated in the bill, they, as before stated, were abandoned, and those insisted on are the following: That neither the complainant nor her husband has ever had an account of what she claims to be her share of the income of the estate after July 29th, 1828, the date of the marriage of the executrix to Dr. Chetwood; that there should have been charged against the executrix the sum of \$1,027.40, which the complain-

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ant alleges was collected by the executrix, June 24th, 1828, on a claim of the estate against the estate of her father, Gen. Jonathan Dayton ; that the executrix and Dr. Chetwood have not accounted for so much money as they ought in respect to the Ohio land sold under legislative authority, as before mentioned. The complainant alleges that that property was worth from \$16,000 to \$20,000, but it was sold for \$9,000 ; and she insists that it was sold in violation of duty, because the will directed that it should not be sold until all the children should have attained their majority. She further alleges that if the conduct of the executrix and Dr. Chetwood in making the sale be approved, they have not accounted for enough ; that they have not accounted for all the interest received on certain notes made by John Dick, and belonging to the estate, nor for the money—\$221.77—which, at the testator's death, stood to his credit in his bank account in the State Bank at Elizabeth ; that a charge of \$200 for repairs to a house called the Hale house, is unjust, because the house, at the date of the charge, did not belong to the estate ; that a charge of \$1,960, for money alleged to have been paid by the executrix on account of a note held by David Rogers, is unjust. The complainant insists that the money was paid by Gen. Dayton, who was liable as principal therefor ; that a charge for repairs to a house of the estate on Jersey street, in Elizabeth, is unjust, because the executrix and Dr. Chetwood occupied the house at the time of making the repairs (in 1836), and did not account for the rent ; and that the loss (it occurred in 1835) on certain insurance stock should have been borne by the executrix and Dr. Chetwood, or one of them, and not by the estate, and the complainant insists that therefore the charge of \$521.30 against her in the account, in respect to that loss, was erroneous. She insists that the stock was the property of Dr. Chetwood, and not of the estate, and that the executrix had no authority to invest the money of the estate in insurance stock.

As to the first of these objections : The will gave to the widow, for her support, and for the purpose of maintaining and educating the children during their respective minorities, the use of the whole of the estate. It provided for the payment to each child,

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on his or her becoming of age, or in case of marriage, at eighteen, of his or her share of the estate, and that after the youngest had been paid, the widow should have the use of one-third of the real estate and an annuity of \$600. That is to say, the estate, except one-third of the real estate, to be reserved for the widow for life, and a sum which would produce for her a life annuity of \$600, was to be divided among the children as they arrived at age or were married, if not under eighteen. The plan adopted in settlement, as to the personal estate, appears to have been to divide it, taking security for the annuity. The complainant, then, if she received the full amount of her share of the personal estate in the settlement of 1837, took away one-third of that estate, leaving in the hands of her mother the other two-thirds, in which the complainant had no interest. As to the income received from the estate prior to that settlement, it was clearly, by the terms of the will, given to the widow so long as she remained guardian. And she was not bound to account for it during that time, so long as she discharged the duty in respect to which it was bequeathed to her. *Macknet v. Macknet*, 11 C. E. Gr. 258; *S. C. on appeal*, 12 C. E. Gr. 594.

The will provided that in case of her remarriage her guardianship should cease, and that Peter Kean should be guardian in her stead. Peter Kean, according to the bill, died a few months after her remarriage, and he appears never to have assumed any duty as guardian. The widow continued her care of the children and their education until they attained their majority or were married. No question appears to have been made as to her right to the income at any time, until it was made by the complainant in 1872, over thirty years after the youngest child attained to majority. No charge was made in any of the settlements for the support or education of the children, nor were any commissions charged by the executrix or guardian. The income may not have been in excess of the amount which would have been allowed to the widow, under the circumstances, for the support and education of the children. But however that may be, no account was, so far as appears, ever even suggested, but the appropriation of the whole income, as compensation for the support

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and education of the children, seems to have been acquiesced in. It would, therefore, obviously be highly inequitable, under such circumstances, after so long a period of acquiescence and delay in making the claim, to require the widow, were she living, to come to an account as executrix, or Dr. Chetwood as guardian, of the excess of income, if any there was, over and above what would have been allowed for support and education. It would probably be impossible to give such an account. And here it may be remarked that the complainant's interest in the estate was looked after by her husband, who was a lawyer and abundantly competent to do so; and, moreover, the share became his own on his reducing it to possession. Susan's first husband, too, was interested in like manner as to her share, and it may be presumed that he looked after her interest carefully. Robert was a lawyer. It is hardly to be supposed that this matter of the right to the income did not receive due attention in behalf of the children.

The claim that certain money, alleged to have been received on account of a demand of Dr. Spencer's estate against that of Gen. Dayton, has not been accounted for, is not sustained. It appears that under an agreement of the creditors, or some of them, of the Dayton estate, certain land in Ohio was purchased for them at the administrator's sale thereof, and the title taken and held in trust accordingly; and though \$1,027.40 were receipted for in the transaction, by the attorney of the executrix to the administrator, as so much money paid by the latter to the attorney, yet it appears to have been receipted for as part of the purchase money of the property. The account shows a charge against the executrix of \$800, for money received from the conveyance of the land, and \$126 for the balance of the dividend of twenty per cent. paid by Gen. Dayton's estate. There is no evidence of any error in this matter.

The sale of Ohio land owned by the testator was, according to the evidence, made at a time when it appeared very desirable and for the interest of the children as owners of it, that it should be made. The price obtained was regarded as an excellent one at the time. There appears to have been no concealment in the transaction. Indeed, it would seem that concealment, under the

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circumstances, was hardly practicable. In the conveyance that was made the executrix joined, to release her dower. The property was sold in accordance with what appears to have been the judicious advice of a competent and careful adviser—it was sold in 1833—and the proceeds were accounted for in the settlement with the children. The exhibits in the cause account for all of the \$443.62 charged for expenses of obtaining the law and commissions for selling, except \$108.88. This charge of \$443.62 was in the account of 1837, and was of course subject to scrutiny then.

The interest on the Dick notes appears to have been accounted for up to the death of the testator, and the interest which accrued after that was probably claimed by the widow as income due her. The money was collected in 1825 and 1826; the interest was collected in the latter year, and that was two years before her remarriage.

The balance (said to be \$221.77) of the testator's bank account does not appear to have been accounted for, but it is not in the inventory which, according to the bill, was made and proved by the executrix and Peter Kean, and it is not probable that money in bank was overlooked in making and proving the inventory. It is suggested that the money may have been used to pay funeral expenses, for which there is no charge in the account. It may have been expended for them and other usual concomitant family expenses. It is also suggested that it may have been only an apparent balance, and was exhausted by checks given by the testator, but not paid till after his death. But, not to deal with conjectures, it would have been too much to require the executrix, at her advanced age when the bill was filed (she appears to have been about eighty-five years old when this suit was begun), to account for or explain this. She is now dead. Dr. Chetwood is about seventy-eight years old. He is not charged with knowledge of the matter. The inventory was made four years before he married the widow.

The charge for repairs to the Hale house has not been explained. It seems to have been dated in 1831, while the deed for the property to Dr. Chetwood and his wife is dated in No-

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vember, 1832. The property was regarded as belonging to the estate, and not only the proceeds of the sale of it were accounted for, but the profit made upon it also. Certain it is that this charge of \$200 for repairs to the Hale house was made under date of 1831 in the account given to Mr. Wood, and if it had been so obvious a mistake as is now contended, it must have challenged his attention. It appears also in the account rendered to Susan. By one of the exhibits put in by the complainant, the repairs appear to have been, in whole or in part, putting in a new front to the house, painting it, and putting a new roof on the back shed. Though the charge is not found in the account rendered to Robert, it appears, by a statement made by Dr. Chetwood, given in evidence by the complainant, and which came from among Mr. Wood's or her sister Susan's, or Dr. Chetwood's papers, that it, with several other payments there specified, was overlooked in the settlement with Robert.

It will be convenient here to deal with the objection made to the charge for repairs to the Jersey street house. That house was occupied by the widow when the repairs were made (1831), and it is insisted that she was bound to make them because she had the use of it, but—and this remark is equally applicable to the repairs to the Hale house, in respect to which the same suggestion is made on the ground that she received the rents—she was not a life tenant, but seems to have claimed to be entitled to the use of the income of the property for a limited period (during the minority of the children), and that claim appears to have been allowed, at least by acquiescence. What are called repairs in this instance, it may be added, appear to be, in part at least, the building of an ice-house and new fences.

Dr. Spencer was liable as surety with his father-in-law, Gen. Dayton, on a promissory note held by David Rodgers. On September 11th, 1824, the fall after Dr. Spencer's death, Gen. Dayton received from his daughter, the executrix, \$1,960 for investment. By his receipt to her therefor, he promised to invest the money for her, as soon as practicable, in New York state securities, or, if the investment could not be advantageously made, to return it to her on demand. Judgment was recovered against him and

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Dr. Spencer by Rodgers, on the note, in the supreme court of this state, May 13th, 1823. On the 13th of September, two days after he received the \$1,960 for investment, he paid exactly that sum of money to Rodgers's attorney, on account of the judgment. If the money so paid was hers, and it was applied by her father, with her consent, to the payment of the judgment, it was a payment by the executrix for Dr. Spencer's estate. The claim was made in the account delivered to Mr. Wood, and it is to be found in those delivered to and settled by Susan and Robert. In the account delivered to Robert it is under the date of September 11th, 1824, the date of Gen. Dayton's receipt to Mrs. Chetwood, and it is specifically charged as a payment by her to Rodgers. It would be enough to say, however, that it is not only not established that she did not pay the money, but the circumstantial evidence indicated that she did. The charge for loss on stock of the Equitable Insurance Company seems to have been discussed between Mr. Wood and Dr. Chetwood, and they appear to have submitted the question to Theodore Frelinghuysen for his opinion. He gave it, under date of August 7th, 1837 (the receipt from Mr. and Mrs. Wood is dated August 31st, 1837, and the opinion therefore preceded it), to the effect that any losses which had been sustained in insurance stock, by reason of the then late great fire in the city of New York, should fall on the estate, and not on the executrix. The will directed that certain funds should be invested in stocks. It is said that no charge for this loss is made in the account rendered to Robert, but the paper which is treated as being that account is dated in November, 1835, and his receipt for his share is dated the 11th of that month. The fire had not then taken place; it occurred in December following. The stock is put down as part of the assets in that account. The question of the propriety of the investment in insurance stock was submitted to Mr. Frelinghuysen, and decided by him then, before the settlement of 1837 was made, and his decision was acquiesced in and submitted to by Mr. Wood.

According to the inventory and the account rendered to Mr. Wood, the estate owned but forty-three shares of the stock of the State Bank at Elizabeth. The complainant, however, insists that

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there were sixty-three, and that Dr. Chetwood should account for the difference. It appears by the books of the bank that at the death of the testator there were sixty-three shares standing in his name, and that in September, 1824, twenty shares were transferred to Caleb Halstead, jun. It also appears thereby, that in August, 1822, Halstead transferred twenty shares to Dr. Spencer. It is not necessary to query whether the latter were assigned to the testator as collateral security for a debt subsequently paid, or were held by him in trust, or to conjecture what is the reason of the discrepancy. It existed when the account was delivered to Mr. Wood. In that account, and in the other accounts, it is said that of that stock the estate held only forty-three shares. The inventory was not made by Dr. Chetwood, but by Peter Kean and the widow. They probably believed it to be correct, and had good reason for the statement that the estate owned only forty-three shares of the stock. Verification of the inventory and accounts in this respect was easy, and it may be assumed that in this matter the discrepancy was known and satisfactorily accounted for.

I have thus considered the various reasons which are given by the complainant for requiring an account, and I do not find that any of them would justify such a requirement. There is no evidence of any fraud or concealment; on the contrary, everything appears to have been open to inquiry. The accounts rendered to the children were subject to the scrutiny of persons who were most competent to make the examination. Not one only, but two lawyers were directly and personally interested in the settlements. The shares for which account was made to them wholly belonged to them, and each appears to have made the settlement for himself. Each settlement necessarily involved an account of the estate. The advice of Mr. Frelinghuysen appears to have been sought and obtained in reference to the account of the complainant's share, and it would seem that the disputed questions were submitted to his decision. The fact that there were such questions is evidence that the account was closely scrutinized. On the 19th of January, 1838, another statement was made by Dr. Chetwood for Mr. Wood, and annexed to it was a

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receipt which recited that by a statement of the accounts of the executrix, and of Dr. Chetwood, the guardian of Mrs. Wood, there appeared to be due to Mrs. Wood \$16,511.21, and it was thereby certified that that sum had been paid to Mr. and Mrs. Wood by the assignment of certain securities and payment of cash, &c., and the giving of a bond and mortgage. And further, that the receipt of August 31st, 1837, had been given. It will be seen that the receipt is to the guardian as well as the executrix. The husband, Mr. Wood, was entitled to the share of his wife, if in the hands of either of them. He, being entitled to the property, was the proper person to demand and have an account of it; and being so, his wife, though a minor at the time of the accounting, is bound by the account to the same extent that he would be. It is not a question whether the husband could release the demand of the wife without receiving satisfaction for it, but whether an account was made to and settled by a person legally authorized. If it was, then the further question is whether this court will, after the lapse of over forty years, open the account. It is at least doubtful whether there is any error. And the presumption from the circumstances, the excellent capacity of him who made the settlement on behalf of the complainant, the care and circumspection which he evidently exercised in making it, and the acquiescence in it by him for the rest of his life, twenty-eight years, and by the complainant for thirty-four years, is that the account was satisfactorily settled. The complainant's claim must be regarded as a stale and antiquated one, such as this court does not favor, but, on the other hand, discourages. As before stated, she acquiesced for thirty-four years. Her sister Susan does not appear to have ever been dissatisfied with the account, and Robert lived twenty years after the account with him was settled, and he never, so far as is shown, questioned its correctness. The impolicy as well as the injustice of requiring an account after so long a period of acquiescence, is illustrated in this case. In 1872 the alleged errors of which the complainant complained, and to which she asked Dr. Chetwood's attention, were only an overcharge of the value of stock of the State Bank at Newark, belonging to the estate, the

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non-allowance to her of a share of the profits of the sale of the Hale house, and the non-allowance of any part of the income of the estate during the minority of the children. The first was explained by the books of the bank, and the existence of error disproved. The profits on the sale of the Hale house were, in fact, allowed in the account. In the bill in this cause it is claimed that there should be an account of \$3,024.88 for nineteen shares of the stock of the Bank of Kentucky, and the dividends thereon, and of \$800 received from the sale of the Hatfield property mentioned in the will; but both of those claims were abandoned on the hearing. The estate is credited in the account with the proceeds of the sale of the Hatfield lot, and the complainant admits that she was also in error as to the Kentucky Bank stock. "It is an inherent doctrine of this court," says Story, "not to entertain stale or antiquated demands, and not to encourage laches and negligence. Hence, in matters of account, although not barred by the statute of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, "*Vigilantibus non dormientibus, jura subveniunt.*" *Story's Eq. Jur.* § 529; and see *Peacock v. Newbold*, 3 Gr. Ch. 61; *Barnes v. Taylor*, 12 C. E. Gr. 259. In the case in hand the justice of that doctrine and the propriety of its application are manifest. The executrix, when she was examined, was in extreme old age; she was over eighty-five years old. She declined to be cross-examined, pleading want of memory; and the complainant testified, in less than a year afterwards, in this suit, that her mother's mind was almost gone. Dr. Chetwood is, as before stated, seventy-eight years old. The complainant has had the benefit of all his papers, obtained from his wife during his absence in France, and she has had another unusual advantage in the possession of the accounts delivered to Susan and Robert. She has not been able to show any fraud, and has not made such

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proof of any error as to overcome the presumptions which equity raises under the circumstances.

The bill will be dismissed, with costs.

LANSING ZABRISKIE

v.

THE MORRIS AND ESSEX RAILROAD CO.

A trust to sell or improve lands; to invest and re-invest the proceeds; to collect rents and income; to pay taxes, assessments, commissions, and other annual expenses and charges; to pay over the net income, and to divide the estate, vests a fee simple title in the designated trustees, not limited to the lifetime of the donor's children, which trust descends to the heir at common law, the eldest son of the survivor of the trustees, and his contract to sell lands of the estate may be specifically enforced.

Bill for specific performance.

Mr. L. Zabriskie, pro seipso.

Mr. J. D. Bedle, for defendant.

THE CHANCELLOR.

By an agreement in writing duly made between the parties in October, 1878, the defendant agreed to purchase of the complainant two plots of land in Hudson county, on his making and delivering to it a good and sufficient deed of conveyance therefor, vesting in it a title in fee simple, free from all encumbrances, and he, on his part, agreed to sell and convey the property to the defendant for the price stipulated, so soon as he could make such title. The land was the property of John Tonnele at the time of his death, and the complainant claims title thereto under Mr. Tonnele's will, as the heir at common law of his father, the late

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Abraham O. Zabriskie, whose eldest son he is, and who was the last survivor of the executors and trustees under that instrument. The question presented for decision is whether he indeed has such title. Mr. Tonnele died in 1852. By his will, after making certain specific devises and bequests, he gave, devised and bequeathed all the rest and residue of his property, real and personal, to his eight children, to be equally divided among them in such manner that each child should receive only the net rents, income and profits of his or her share during his or her life; and he provided that at the death of each child, his or her share should go to and vest in his or her lawful issue; and in default of such issue living at his or her death, then to the testator's other children and their issue in the same manner as the share of each was thereby limited and given: the children of any deceased child to take their parents' share. And in order more fully to carry out the objects of the will he appointed and declared his executors to be trustees of all property, estate or interest therein given or devised to any of his children, or that any of his children might be entitled to by virtue of any provision of the will during the life of such child; with full power to retain all such property in their hands unsold and undivided until after the year 1867; and he thereby authorized them to sell and convey all or any part of his real estate, and all real estate that might be purchased by them, and to invest his personal estate and the proceeds of sale of his real estate at interest on bond and mortgage or in government or state stocks, or to lay them out in the improvement of his real estate, or the purchase of other real estate and the improvement thereof, as might seem most for the interest and advantage of his children, and for the improvement of his estate, and to change such investments as they should deem best from time to time. And he thereby ordered and directed them to pay over to each of his children during his or her natural life, the net income of that part or portion of his estate therein given or devised to such child, after deducting therefrom all taxes, assessments and commissions and other annual expenses and charges; the income of each of his daughters to be paid to her on her own receipt, for her own use, free from the control of

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any husband ; and that of his son to be paid to him on his own receipt, and not to any assignee or mortgagee thereof. He appointed his wife and Robert Gilchrist and Abraham O. Zabriskie executors. They all proved the will, and, as before stated, they are all dead, Mr. Zabriskie being the last survivor.

By the will the testator gave to his executors as trustees such control over the property, real and personal, given to his children by the residuary clause, as to necessitate the implication that he designed to give them the fee of the land. He expressly constituted and declared them to be trustees of the property. He empowered them to retain the real estate unsold and undivided until after 1867. As before stated, he died in 1852. He authorized them to sell and convey all or any part of the real estate and all that they might buy, and invest the proceeds in certain stocks, or in the purchase of other real estate, or in the improvement of his real estate, as they might think most for the advantage of his children and the improvement of his estate, and to change the investments from time to time. And he directed them to pay over to each of his children, during his or her life, the net income of the part or proportion of the estate given or devised to him or her, after deducting therefrom all taxes, assessments, commissions and other annual expenses and charges. The authority to divide the land among the children implies the gift of a fee. How were the trustees to divide it unless they had the power to convey ? No express power to lease is given ; but they are to pay over to each child, during his or her life, the net income of his or her share of the estate, real as well as personal, and that, too, after deducting not only annual taxes, but municipal assessments and commissions and other annual expenses and charges, whatever they might be. The power to sell and convey all his land and buy other land with the proceeds and take the title in their own names, is undoubtedly given. They might sell some of his land and spend the proceeds in improving the rest or any part of it. In short, complete power is given to convert the land into money, and to make such disposition of the proceeds in expenditures, in improvements or in investments, as they might see fit. This extensive authority is

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utterly incompatible with the exercise of any control over the property by the children. They cannot sell or convey or encumber it. They are entitled to no control over it, indeed, so long as they live; for the trust is to pay to them the net rents and income for life. To the execution of such a trust as that under consideration, it is necessary that the trustee be clothed with the title in fee. Though the express devise is to the children themselves and there is no express devise to the trustees, that will not prevent the implication of the gift of the fee to the latter; for a direct devise may, by the context, be shown not to give the legal estate to the devisee named, and the legal estate may, if the purposes of the will require it, be held to be in trustees. In *Brewster v. Striker*, 2 N. Y. 19, there was a devise to grandchildren and their heirs forever, with direction that the estate be "disposed of" by the executors and the survivor of them and the executors or administrators of the survivor, not by sale or alienation, which were forbidden, but by lease; the rents, issues and profits to be paid to the "heirs" (grandchildren) annually; and it was also provided that if any of the heirs or their children should choose to occupy any part of the property, they were to be preferred as tenants. By a subsequent clause it was declared that if any of the grandchildren should die without issue, the share of such decedent should go to the survivors or survivor and the heirs of the survivor forever. It was held that the trustees took the legal estate by implication during the lifetimes of the grandchildren. See also *Doe v. Willan*, 2 B. & Ald. 84, and *Doe v. Cafe*, 7 Exch. 675. It is not necessary, however, to cite authorities for so obvious a proposition, resting, as it does, on the familiar principle that in testamentary dispositions the intention of the testator is to be sought for, and, when found, is to control the construction. That the testator's intention was to create a trust, and that one was created accordingly admits of no doubt. The trust is to sell, to improve, to invest and re-invest, to collect rents and income, to pay taxes and commissions, assessments and other annual expenses and charges, to pay net income over, and to divide the estate. The authority given is not a mere power of disposition which may be executed without any legal title, but

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a trust of such a character as renders it necessary that the legal estate, the title in fee to the property, should be in the trustees. "The mere fact," says Mr. Jarman, "that the trustees are made agents in the application of the rents, is sufficient to give them the legal estate; as in the case of a simple devise to A upon trust to pay the rents to B. And it is immaterial in such a case that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence a devise to the intent that A shall receive the rents and pay them over to B, would clearly invest the legal estate in A." 2 *Jarm. on Wills* 201. See also *Hawk. on Wills* 140; *Hill on Trustees* 231, 232, and *Perry on Trusts* § 213. Nor can the purposes of the will in this case be answered by confining the legal estate to the lifetime of the children; for the trustees have power to lease and to sell and convey; and where a devise to trustees upon trusts which, standing alone, would not vest in them the whole legal estate, is followed or accompanied by a power to sell, lease or mortgage not limited to the period of the continuance of the active trusts, the trustees are held to take the whole legal fee, and not a mere limited estate, with a superadded power of sale, mortgage or leasing. *Hawk. on Wills* 153; *Barker v. Greenwood*, 4 *M. & W.* 421. Not to speak of other considerations, it was necessary that the trustees have power and authority to sue in their own names for injuries to the real estate, and to establish title thereto as against adverse claimants, and that in making improvements, whether by the erection of buildings or otherwise, they should have the legal ownership of the property improved. The case is obviously to be distinguished from those of which *Gest v. Flock*, 1 *Gr. Ch.* 108, and *Moore v. Moore*, 12 *Vr.* 440, are examples; for in them the gift was of a mere power which could be exercised without any estate in the donee thereof. In the case under consideration, at the death of the last survivor of the trustees, the trust still existed and was to continue as to the payment of the income to the children during the lives of the latter. The power (it was more; it was a trust) to convert that part of the real estate of which the testator died seized, which was still unsold, remained, and it was coupled with a duty to in-

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vest and husband the proceeds in case of conversion, and pay over the net income or make improvements with them, if the trustee deemed best; and the trust to make division of it with the rest of the estate, if it remained unsold at the time of division, still continued. To the execution of this ample and extensive trust, co-extensive with complete ownership, an estate in fee in the trustee was not only convenient, but necessary. Nothing less would satisfy the trust. He, therefore, had such title. The last survivor did not devise the land. By law his estate therein descended to his heir at the common law, his eldest son, the complainant, who, therefore, can convey it in fee to the defendant. *Schenck v. Schenck*, 1 C. E. Gr. 174; *Wills v. Cooper*, 1 Dutch. 137; *Boston Franklinite Co. v. Condit*, 4 C. E. Gr. 394; *Rev. p. 1224, tit. Trustees, § 1*.

There will be a decree for specific performance.

NETTIE CARPENTER and others

v.

THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN
and others.

1. A statutory lien on lands for annual water-rents cannot be extended by construction so as to include water furnished by the city commissioners under a contract with a tenant for years; and hence a sale of the premises occupied by such tenant, for default in paying such water-rents, is *ultra vires*, and may be set aside on application of the owner.

2. Where the authority of the commissioners is terminated by their assessment and return to the common council, they are unnecessary parties to a suit to set aside a sale of lands ordered by the common council and predicated on their proceedings.

Bill to remove cloud from title. On bill and answer of the mayor and council, and replication thereto, and proof taken under the issue so joined, and plea of the water commissioners of the city of Hoboken, and agreement of counsel.

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Mr. J. C. Besson, for complainants.

Mr. M. W. Niven, for defendants.

THE CHANCELLOR.

The bill is filed to remove from the complainant's title to land in Hoboken the cloud cast thereon by two sales thereof by the city (at both of which it was itself the purchaser for two terms of one hundred years each), for the non-payment of the price assessed against the property for water furnished by the water commissioners of the city of Hoboken to Alexander Feyle, the complainant's tenant of the premises. The suit is brought against the water commissioners, as well as the city, and the relief prayed is the avoidance and cancellation of the charges made against the property by the commissioners, the annulment of the sales and the cancellation of the record thereof. The city has answered, insisting on the validity of the lien and sales, and the commissioners have pleaded.

No warrant or authority of law is to be found for the charges in question and the consequent proceedings thereunder. By the act of March 27th, 1859, (*P. L. of 1859 p. 433*), a lien for annual water-rents, to be fixed from time to time by the commissioners, is created, and provision is made for the enforcement thereof by sale of the property whereon it is charged. But no other or further lien or charge on the land is authorized thereby. In the case in hand, the annual water-rents have, it is alleged by the bill and admitted by the answer, been duly paid, and no lien is claimed for or in respect to them, but the lien is claimed on account of water furnished to the yearly tenant by the commissioners, under a contract between him and them. For the recovery of the money due for that water, the commissioners might, under the act, maintain an action against the tenant, but no lien or sale of the property of the complainants therefor is authorized. All the proceedings called in question by this suit are *ultra vires*, and therefore null and void, and should be so declared. The water commissioners have pleaded that they have no interest in the land or in the sale thereof, and have no claim

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thereon, and that all of their interest ceased when they made return of the assessment to the mayor and common council, as set forth in the bill. The plea is set down for argument at the final hearing, on the agreement that if it be held bad a decree shall be entered against the commissioners, as well as the city, in case it be held that the proceedings complained of in the bill are null and void *ab initio*, the question involved being a mere question of law. The bill states that the commissioners, unlawfully and without any authority from the complainant, charged against the latter the amounts due the commissioners from the tenant, in the same manner as if they had been for water-rents lawfully assessed on the property. By the act the commissioners are directed, from time to time, to fix a sum to be assessed annually upon all vacant lots and lots with buildings thereon in the city in which Passaic water is not taken, and also upon lots or buildings where the water is taken, if the same are situated on any road, street, avenue, lane, alley or court in the city through or in which pipes for distributing the water are laid, which prices and sums so fixed and assessed are to be denominated water-rents; that the water-rents and penalties for delaying payment beyond the time fixed shall, until paid, be a lien on the property charged therewith; and that the commissioners shall, on and after a day specified in the act, in each year deliver to the mayor and common council of the city a certified account of the water-rents and penalties unpaid, and that they shall be collected for the commissioners by the means employed by the city for the collection of taxes. The action of the commissioners with respect to the lien terminates on the delivery of the statement in the act called "the account" of their assessment; and this statement or account is the record, and so far as the requirements of the act are concerned, the only record, of the assessment. The commissioners are not necessary parties to this suit. They have no interest in the event of it, nor are they necessary to the relief sought. The assessment was, indeed, made by them, and not by the mayor and council; but that does not, of itself, give the complainant a right to compel them to answer. Commissioners by whom an assessment is made under appointment by a municipi-

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pal body for the cost of municipal improvements, are not proper parties to a bill to remove a cloud on title created by their action in making the assessment; and the commissioners in this case stand in a like relation. No decree can be made against them. They claim no lien by virtue of their assessment; nor do they hold any record of lien—that is held by the mayor and common council. They have no interest whatever in the subject of this controversy. The complainant's property was sold to the city for terms of years, to pay the assessments, and, under the act, the amount for which it was sold was immediately payable to the commissioners out of the city treasury. It cannot be recovered back from them. They are a mere department of the municipal government. As to the grounds or elements of the assessment, the commissioners are witnesses merely.

The plea will be allowed, and a decree made against the mayor and common council of the city, according to the prayer of the bill.

Under the agreement, the bill will, as to the commissioners, be dismissed with costs.

THOMAS W. JAMES

v.

SUSAN LANE and others.

Upon the application of the widow of a decedent and of the guardian of his minor children, and upon their promise to repay him out of the rents of the property, the complainant, in order to save the *real* property of the estate from a forced sale, advanced money sufficient to pay those creditors of the estate who had proved their claims. Afterwards, and upon their like solicitation and promise, he advanced further sums of money to pay interest on a mortgage on the property and to make necessary repairs. Only a small portion of such advances having been repaid, he demanded the balance of the guardian, who thereupon gave him a power of attorney to collect the rents and appropriate them in satisfaction of his claims, such power acknowledging that his debt was for money advanced for the benefit of the property, and to protect it from a public sale. He collected a small amount, and then the guardian,

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without assigning any reason, refused to allow him to collect any more rent. The guardian filed an account in the orphans' court, but omitted complainant's claim therefrom, and an exception on that account by the complainant was dismissed. After demanding payment of the widow and guardian, complainant filed a bill against them for payment of his claim, and, if the assets should be insufficient, that the amount due or the deficiency might be charged on the lands. On demurrer—*Held* (the power of attorney being still in existence), that equity would aid complainant in obtaining payment of his debt by the collection of the rents under the power, until fully re-imbursed.

Bill for relief. On general demurrer.

Mr. H. P. Reilly, for demurrants.

Mr. J. N. Braden, for complainant.

THE CHANCELLOR.

The complainant seeks to recover a sum of money, \$569.74, lent and advanced by him to the defendant, Hugh P. Reilly, as guardian of the minor children of Joseph Lane, deceased, to protect their real estate from sale for the payment of the debts of their father (from whom it descended to them), to pay interest on a mortgage thereon, and to repair the property, &c. Lane, at his death, left a widow and the before-mentioned children. In

NOTE.—While a guardian may be liable for depreciation in the value of his ward's buildings (*Willis v. Fox*, 25 Wis. 646; *Irvine v. McDowell*, 4 Mon. 629); and may repair (*Green v. Winter*, 1 Johns. Ch. 26; *Hood v. Bridport*, 11 Eng. L. & Eq. 271; *Cornell v. Vanardsdalen*, 4 Pa. St. 364); ordinarily he has no authority to improve his ward's real estate (*Haggerty v. McCanna*, 10 C. E. Gr. 48; *Snodgrass's Appeal*, 37 Pa. St. 377; *Kearnes's Account*, 1 Pa. St. 326; *Lane v. Taylor*, 40 Ind. 425; *Bellinger v. Shafer*, 2 Sandf. Ch. 293; see *Jackson v. Jackson*, 1 Gratt. 143; *Newton v. Poole*, 12 Leigh 112; *Powell v. North*, 3 Ind. 32; *Este v. Strong*, 2 Ohio 478; *Bonsall's Case*, 1 Rawle 266; *McCracken v. McCracken*, 6 Mon. 349); and while he may be personally liable for the cost thereof (*Sperry v. Fanning*, 80 Ill. 374; *Findley v. Wilson*, 3 Litt. 390; see *Westbrook v. Comstock*, Walk. Ch. 314; *Robinson v. Hersey*, 60 Me. 225); the party erecting the structures has no lien therefor on the ward's lands (*Guy v. Du Uprey*, 16 Cal. 195; *Copley v. O'Neil*, 57 Barb. 299, 39 How. Pr. 41; *McCarty v. Carter*, 49 Ill. 53; *Payne v. Stone*, 7 Sm. & Marsh. 367; see *Davis v.*

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February, 1875, letters of administration of his estate and guardianship of the children were granted to Frederick T. Farrier. A rule of the orphans court was made at that time, requiring the creditors of the estate to bring in their debts within a limited period, and a decree barring all who had not come in was made in November following. On a representation of insolvency, an order to sell the real estate of the intestate to pay debts was subsequently made, but in April, 1876, the administrator was, for some cause, restrained by the court from making the sale. The creditors, or some of them, threatening to proceed to obtain a sale of the property to pay their debts, the widow and Hugh P. Reilly, who in June, 1876, was appointed guardian in the place of Farrier, applied to the complainant and requested him to advance to the guardian the money necessary to pay the claims of the creditors who had proved their debts within the period limited by the before-mentioned rule, and so enable them to save the property from the inevitable sacrifice of a public sale in the then depressed condition of the real estate market. He consented and complied with their request, and accordingly advanced to the guardian the money requisite to pay the claims of the creditors, which amounted to \$213.29; the guardian and the widow, whose dower had not and has not yet been assigned, agreeing to repay him out of the rents of the property on request. He afterwards, on the like solicitation of the widow and guardian, and on the

Bradford, 24 Me. 342); nor can the guardian be re-imbursed for advances by him for such purposes (*Hassan v. Rowe*, 11 Barb. 22); a guardian cannot mortgage his ward's lands (*Merritt v. Simpson*, 41 Ill. 391; *Tyson v. Latrobe*, 42 Md. 325; see *Mohr v. Tulip*, 40 Wis. 66; *Winborne v. White*, 69 N. C. 253); although if he purchase property mortgaged, he holds it for the benefit of the wards, subject, of course, to the encumbrance (*Smith v. Maxwell*, 7 Mon. 602); and has power to redeem it (*Marrin v. Schilling*, 12 Mich. 356); he may not obtain an order of sale for the mere purpose of paying off a mortgage on the premises (*Greenbaum v. Greenbaum*, 81 Ill. 367; see *Smith v. Sackett*, 10 Ill. 534; *Shinn v. Budd*, 1 McCart. 234).

In Louisiana, a mortgage given by a guardian on the ward's lands for the purpose of making repairs, paying taxes, and providing for the maintenance and education of the ward, is valid and a preferred claim (*Beauregard v. Lereau*, 30 La. Ann. 302).

In *Eastwood v. Kenyon*, 11 A. & E. 438, a guardian borrowed money of A

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like agreement for repayment, advanced more money, to the amount of \$511.60, to make needed repairs upon the property, to pay interest on a mortgage thereon, and to make other payments which were necessary to be made to save the property from sale. They having repaid him only \$75.15 of the money advanced, he, in March, 1878, demanded payment of the balance, \$649.74, and the guardian gave him a power of attorney, authorizing him to collect the rents until he should be paid in full, and after paying taxes, insurance premiums and interest, and making necessary repairs, to apply the balance to the payment of his debt. To obtain this power of attorney he was compelled to advance \$100 more (which he did on the like agreement for repayment), to put the property in tenantable order. The power of attorney acknowledges that his debt was for money advanced by him for the benefit of the property, and to protect it from sale. Under the power he collected \$80, and then the guardian, without assigning any reason for so doing, refused to permit him to collect any more rent. Subsequently, the guardian filed his account, but it was silent as to the debt due the complainant. The latter excepted to it, thus seeking to obtain payment, but the exception was dismissed. The guardian and the widow refusing to pay him, he filed his bill to compel the guardian to pay his debt, and if the latter has not assets enough in his hands to do so, to charge the amount, or any deficiency which may exist after

which he expended in his ward's maintenance and education, in improving the ward's land, and in paying the interest on a mortgage thereon; the ward, when of age, approved such expenditures, and promised to pay A's note, and in fact paid one year's interest on it; the ward's husband, after his marriage, assented thereto, enjoyed the improved estate, and promised the guardian to pay the note.—*Held*, the husband was not liable, because no sufficient consideration for his promise was averred.

One advancing money to pay an intestate's debts, acquires no lien therefor on the lands in the hands of the heir (*Lieby v. Parks*, 4 Ohio 469).

Where A and B are the joint-owners of a house, and A had laid out in improvements thereon money3 he had obtained from B.—*Held*, that B had no lien on the house for the amount (*Kay v. Johnston*, 21 Beav. 536; *Curtiss v. White*, *Clarke* 389).

The fact that one furnished the money with which grain was purchased, would give him no specific lien thereon (*Hodges v. Kimball*, 49 Iowa 577).

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applying such assets, on the real estate. The defendants have filed a general demurrer. That the complainant ought in equity to have satisfaction for his claim out of the estate, there is no room to doubt. He has, according to the bill, advanced the money necessary to save the property to the widow and children. So signal a service ought not to have been requited by a denial of repayment, and the complainant should have justice here. The old case of *Hooper v. Eyles*, 2 Vern. 480, is cited by the demurrants. There, an infant had an estate subject to a money charge, and the money being called for and his guardian being unable to pay it, the guardian borrowed it from the complainant and paid off the encumbrance, and promised to give the complainant a security for the advance, but died before she had done so. The complainant sought to obtain satisfaction of his debt out of the infant's property by subrogation to the rights of the encumbrancer, but that was denied, on the ground that there was no contract or agreement to charge the money on the land, and, therefore, the money could not be followed, nor the land be charged with it. The court, however, did not deny all relief; but it appearing that the guardian had distributed more than she had received out of the infant's estate, an account was ordered, with direction to raise any amount which should appear to be due to the guardian out of the infant's estate, and apply it to the payment of the complainant's debt. In this court, in *Haggerty v. McCanna*, 10 C. E. Gr. 48, the amount of a mortgage on an infant's land paid off by a stepfather, was, under the circumstances, charged on the land. In this case, the bill alleges in substance that the money was advanced on the faith of an agreement that it should be repaid out of the rents and profits of the real estate to save which it was borrowed. Also, that a

One who advances money as a loan, although made expressly for the payment of materials and labor in the erection of a building, can have no claim to the benefit of a mechanics' lien thereon (*Godeffroy v. Caldwell*, 2 Cal. 489; *Gaylord v. Loughridge*, 50 Tex. 573; *Cairo R. R. v. Fackney*, 78 Ill. 116; *Dart v. Mayhew*, 60 Ga. 105; *McCullough v. Kibler*, 5 Rich. (N. S.) 468; *Weathersby v. Sleeper*, 42 Miss. 732; see also *Lee v. Muggridge*, 1 V. & B. 118, 5 Taunt. 36; *Hemphill v. McClimans*, 24 Pa. St. 367; *laege v. Boisseux*, 15 Gratt. 83.)

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power of attorney was accordingly given to the complainant, authorizing and empowering him to collect the rents for the payment of his debt until the debt should have been fully satisfied. It was and is inequitable in the guardian to prevent (for such is, substantially, the statement of the bill in that respect) the collection of rent under the power before payment of the debt in full, and this court will, under the circumstances at least (and it is not necessary now to go further), aid the complainant in obtaining satisfaction of his claim for advances out of the rents. The advances were evidently made on the security of the pledge of the rents. The power of attorney, which is still in existence, was given in pursuance of the agreement to pay the debt out of the rents. The collection of the rents has been interfered with and prevented by the guardian, and he and the widow (she is now married to him) refuse to pay the complainant. The estate has had the benefit of the advances. They were its salvation.

The demurrer will be overruled.

WILLIAM A. CASPER, executor,

v.

FRANK P. WALKER and others.

A testator gave to his wife \$4,000, "the same to be put at interest in some safe investment, and secured to her during her natural life." He also gave her an annuity of \$400, charged on his homestead farm, which he gave to his only child, and added, "It is further my will that the said Amy reside on the aforesaid farm after my decease, and take proper care of the same. In case they (I mean Amy and her husband) should not see proper to move on the same, then I order my executor to sell the same farm at public vendue to the highest bidder; but there is nothing herein contained that affects the dower of \$400 devised to my wife aforesaid." Testator died in 1869, and shortly afterwards Amy and her husband removed to the farm and occupied it for two years, when they leased it until 1880, and then returned, and now reside thereon.—*Held*,

(1) That the gift of \$4,000 to his wife was absolute

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(2) That Amy's estate in the farm was a fee simple, chargeable with the annuity of \$400, and not defeasible on her ceasing to reside thereon.

Bill for construction of will.

Mr. C. H. Sinnickson, for complainant.

THE CHANCELLOR.

Ebenezer Peterson died in 1869, leaving his widow, Clarissa C., and his daughter Amy, his only heirs at law, surviving. By his will he provided as follows: "I give and bequeath unto my beloved wife, Clarissa C. Peterson, the sum of \$4,000, the same to be put at interest in some safe investment, and secured to her during her natural life." "Also, I give and bequeath unto my said wife the annual income of \$400, to be paid half-yearly from the farm where I now reside, in the township of Lower Penn's Neck, purchased of Thomas D. Bradway; the said income to be paid in full, without any de-

NOTE.—The following cases show what words confer on a devisee the right to reside on the lands devised:

That testator's daughters should not be deprived of a home while they remained single (*Nelson v. Nelson*, 19 Ohio 282); that a mother "may be permitted to occupy" lands devised to testator's children (*Snowhill v. Snowhill*, 3 Zab. 447); that "C. shall have a home, during her natural life, on the farm hereinbefore bequeathed to W." (*Willett v. Carroll*, 13 Md. 459); that "I also allow my son to give her [testator's widow] a support off my plantation during her life" (*Hunter v. Stenbridge*, 12 Ga. 192; see *Cabeen v. Gordon*, 1 Hill's Ch. 51); that "T. take care of his grandmother as long as she lives; and she is to live on the land I now live on, and to have the benefit of living on it as long as she may live" (*Gentry v. Jones*, 6 J. J. Marsh. 148); that testator's daughter should have "the use and improvement of so much of my house as she may need during her life, and also a privilege at the fire, which I have made for my wife, while they live together" (*Kingman v. Kingman*, 121 Mass. 249); that testator's widow, to whom a house had been given for life, should "keep his house open to any of his children that may be or have been indigent or unfortunate" (*Lewis v. Reed*, 10 Ga. 293); that testator's widow have "the reasonable use of two suitable rooms in the house that we may happen to dwell in at the time of my decease" (*Beeson v. Elliott*, 1 Del. Ch. 368); "the full privilege of the house, and water and firewood" (*Craig v. Craig*, Bail. Eq. 102); "as a residence for her [testator's widow] and any of my daughters who may remain single" (*Rivers v. Rivers*, 9 Rich. Eq. 203); "the use of

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ductions for taxes or other expenses, this being my expressed wish and will. Also, I give and bequeath unto my beloved wife, Clarissa C., the choice of all my household goods and furniture, or the whole of them, if she chooses, without any reservation."

"I give and bequeath unto my daughter, Amy R. Turner, wife of Jonathan I. Turner, the homestead farm where I now reside, in the township of Lower Penn's Neck, adjoining lands of John Dunn and Elijah W. Dunn, containing about 105 acres, more or less, save the legacy of \$400 per year payable to my wife, Clarissa, as above specified."

"It is further my will that the said Amy R. Turner reside on the aforesaid farm after my decease, and take proper care of the same. In case they (I mean Amy R. Turner and her husband) should not see proper to move on the same, then I order my executor, hereinafter named, to sell the same farm at public vendue to the highest bidder; but there is nothing herein con-

the mansion-house and furniture, and usual family accommodations" (*Pinckney v. Pinckney*, 2 Rich. Eq. 218); "and to live and remain, as long as she is unmarried, in my house, and enjoy the same privileges as she now does" (*Macek v. Nason*, 21 Vt. 115); "my wife is to have a home and good support as long as she lives on the home premises—board and clothing, etc." (*Goodrich's Case*, 38 Wis. 492).

A devise to testator's wife for life, and then, "It is my wish my son W. should live with his mother;" and after her death the fee to be his own, gives no present estate in the land to W. (*Head v. Head*, 7 Jones 620). A devise of a lot for life, and of \$10,000 to enable the devisee to build a house thereon, does not compel him to build the house (*Ashe v. Ashe*, Rich. Eq. Cas. 380; see *Five Points House v. Amerman*, 11 Hun 161; *Beck's Appeal*, 46 Pa. St. 527).

The following words were held to render the devise *conditional* upon the devisee's residence on the premises: that "if A. refuses to dwell there himself, or keep in his own possession" (*Doe v. Hawke*, 2 East 481); that "every such person shall live and reside on the said estate called Juts" (*Fillingham v. Bromley*, Turn. & Russ. 530); that the use and enjoyment should be offered, rent free, to his eldest child for the time being, as long as he or she should please, and in case of refusal, or of his or her ceasing to occupy the same, then to his other children in succession (*Maclaren v. Stainton*, 4 Jur. (N. S.) 199); that the devisee should "reside" in the mansion-house for six months in every year (*Walcot v. Botfield*, Kay 534); that the devisee's estate should be forfeited in case he did not make the mansion-house "his usual and common place of

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tained that affects the dower of \$400 devised to my wife aforesaid."

"Further, I order and direct the balance of my personal property, after securing the \$4,000, to be equally divided between my wife, Clarissa C., and my daughter, Amy R. Turner."

The \$4,000 have been duly invested, and the interest paid to the widow. The questions submitted are: What interest does the widow take in the \$4,000? what estate does the daughter take in the farm under the devise thereof to her? and is that estate defeasible on her ceasing to reside on the property?

The gift of \$4,000 to the testator's wife is absolute in its terms. It is not given over in any event, either expressly or by implication. The will, indeed, provides that it shall be invested for and secured to her during her life; but that is merely a provision as to the manner of its enjoyment by her during her life; the gift of the fund is, nevertheless, absolute, subject to the qualifying trust. *Woodward v. Woodward*, 1 C. E. Gr. 83; *Kay v.*

abode and residence" (*Wynne v. Fletcher*, 24 Beav. 430); that the person entitled should, with his family, reside at the mansion-house, and make it his principal place of abode (*Dunne v. Dunne*, 3 Sm. & Giff. 22, 7 De G. M. & G. 207); "on the express condition only that she remove into and live in said house, herself and family" (*Hart v. Chesley*, 18 N. H. 373); "that my wife is to keep my children, and raise them, and give them a sufficient schooling" (*Crawford v. Patterson*, 11 Gratt. 364); that a plantation be given to E. and M., "provided they come and live on it" (*Lowe v. Cloud*, 45 Ga. 481); that "B. should remain on the farm," and pay certain charges (*Lindsey v. Lindsey*, 45 Ind. 552); that lands should go to O., "providing he shall live on the place, and carry it on in a workmanlike manner" (*Marston v. Marston*, 47 Me. 495. See, further, *Moore v. Gamble*, 1 Stock. 246).

But a condition that if any of the devisees "shall not settle on my land, or those now settled will not remain on said land, but will remove off and leave the same," was deemed void (*Pardue v. Givens*, 1 Jones Eq. 306); so, a devise to testator's children, "in case they continue to inhabit the town of H." (*Newkerk v. Newkerk*, 2 Caines 345; see *Reeves v. Craig*, 1 Winst. 209; *Keeler v. Keeler*, 39 Vt. 550; *Wren v. Bradley*, 2 De G. & Sm. 49; *Ross v. Iles*, 20 W. R. 858); so, if a devisee should not cease to reside in S., within a limited time (*Wilkinson v. Wilkinson*, L. R. (12 Eq.) 604; *Forward v. Thamer*, 9 Gratt. 537).

The following words were held not to be conditional, but that the devisee might reside elsewhere without forfeiting the devise; that testator's wife "shall have her maintenance off of the farm devised to J. while she lives,

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Kay, 3 Gr. Ch. 495; *Hawk. on Wills* 268; *Gulick v. Gulick*, 10 C. E. Gr. 32; *S. C. on appeal*, 12 C. E. Gr. 498.

The devise of the homestead farm to Amy is in fee, subject to the charge of the annuity to the widow. It is not defeasible by her non-residence on the property. The testator declares that it is his will that Amy reside on the farm after his death, and take proper care of it, and provides that in case she and her husband should not "see proper to move on the same," his executor sell it. He adds a further provision that such conversion of the farm into money shall not affect the gift of the annuity charged thereon in the devise. Amy is the testator's only heir at law. He died, as before stated, in 1869. Soon after his death, Amy and her husband removed to the farm, and resided there for about two years. They then leased it, and it was occupied by their tenant. In the spring of 1880 they returned to it, and ever since then have resided thereon.

The intention of the testator, in the provision under considera-

* * * that J. is to let her have the house while she lives, and to furnish her with everything necessary to her comfort" (*Tope v. Tope*, 18 Ohio 520); that she should have "a comfortable room" and "sufficient maintenance during her natural life" (*Steele's Appeal*, 47 Pa. St. 437); that "my five daughters shall have a home in the house, and a reasonable and moderate support, during their single lives, from the said farm"—not lost by one becoming a sister of charity (*Donnelly v. Edelen*, 40 Md. 117); that "I give unto my wife E. the use of that part of my house which I now occupy, during her widowhood, and her full and comfortable support," &c., (*Van Dwyne v. Van Dwyne*, 1 McCart. 49); that A. should have "the right to occupy and possess my estate called Bellegrove, and the furniture, &c., there or elsewhere, during her natural life and widowhood" (*Kearney v. Kearney*, 2 C. E. Gr. 59, 504; see *Murphy v. Murphy*, 20 Ga. 549); that a son to whom a farm had been given "afford a lawful maintenance to my daughter A. and her two daughters, from said farm, as long as they live and shall want the same," and that "A. shall abide and have a lawful maintenance, and her two daughters with her, on said farm, as long as the said A. lives and her two daughters shall want their maintenance"—as to the daughters after A.'s death (*Stillwell v. Pease*, 3 Gr. Ch. 74); that "my mother is to have her support on my estate, to the amount of forty dollars a year, if she chooses to remain on my estate, and if she chooses to go away, she is to be paid the sum of forty dollars a year during her natural life,"—and she goes away, the devisee is still liable, and not the executor (*Henry v. Barrett*, 6 Allen 500); that "it is my desire that my son

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tion, was not to defeat the devise to his daughter, but to secure the property against want of care. He not only does not provide that, in case of non-compliance with his direction, the farm shall go over to some one else, but he makes no provision whatever in that connection, except that the farm be converted by his executor into money, by sale. He makes no disposition of the proceeds of the property after conversion. The residuary clause is confined by its terms to his personal estate. If the farm were converted under this provision, the proceeds subject to the annuity would go to Amy, under the devise; and, apart from that, it would go to her as heir. The annuity is given expressly in lieu of dower. That the testator did not mean to provide that his daughter should reside on the property for life is evidenced by the use of the word "move" in the second clause. In the first, he expresses his desire that she and her husband should reside on the farm and take proper care of it. In the second, he orders that if they do not "see proper to move on"

Aaron remove back to this country, and to have them [slaves], but not to take them to any other part of the country" (*Harris v. Hearne*, Winst. Eq. 91).

The devisee might let the premises to another; that testator's two sons might have the "use and occupation" of certain lands, by paying a stated rent (*Rabbeth v. Squire*, 19 Beav. 70); that W. "may have the choice of those two rooms which shall the best suit her, because I desire that the said W. should be sure of a shelter during the time she may live" (*Wusthoff v. Dracourt*, 3 Watts 240); that a widow might have "the free use and enjoyment of the portions of the house" which she and testator then occupied (*Tobias v. Cohn*, 36 N. Y. 363); "the free occupancy of any house in my possession, for her life, free of any payments or charge whatever" (*Mannox v. Greener*, L. R. (14 Eq.) 456).

See, further, *Trammel v. Johnston*, 54 Ga. 341; *Whittome v. Lamb*, 12 M. & W. 813; *Thomas v. Boyd*, 13 Ind. 333; *Davis v. Vincent*, 1 Houst. 416; *Smith v. Jewett*, 40 N. H. 530.

The devise is not forfeited if the condition be broken by the act of God, as by death (*Sutcliffe v. Richardson*, L. R. (13 Eq.) 607; *McLachlan v. McLachlan*, 9 Paige 534; *Sampson v. Down*, 2 Chit. 529; see *Hayward v. Angell*, 1 Vern. 222); or insanity (*Burns v. Clark*, 37 Barb. 496); or by destruction of the house devised, by fire (*Schanck v. Arrowsmith*, 1 Stock. 314, 330; *Tilden v. Tilden*, 13 Gray 103); or by leaving the premises through constraint (*Jordan v. Clark*, 1 C. E. Gr. 243; *Roe v. Roe*, 6 C. E. Gr. 253; *Craven v. Bleakney*, 3 Watts 19; *Hogeboom v. Hall*, 24 Wend. 146; *Huckabee v. Swoope*, 20 Ala. 491;

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the property, the executor is to sell it. There is no evidence of any intention on his part to compel his daughter to reside on the farm, as a condition of her title to it under the devise. The language of the first clause is merely expressive of his desire. It has no mandatory character, but is merely precatory. The provision, taken altogether, is as if he had said that his daughter and her husband occupy his homestead farm, as their home, immediately after his death, and enter on such occupation and care for it accordingly; but if such should not be their wish, then, in order to secure it against depreciation from want of care, he directed that it be converted into cash, the sale to be subject to the annuity-charge, but the proceeds to go to his daughter. The daughter moved to, and resided on, the farm for about two years, and then leased it, and again removed to it, and now resides thereon. There is no provision that in case she, having moved to it, leaves it and ceases to reside there, the property shall be sold, but merely that it shall be sold if she does not see proper to move there at all. The provision for sale is limited in its operation by its terms, and there is no reason for going beyond the literal import of them. To do so would be to ex-

see *Philips v. Walker*, 2 Bro. P. C. 198); or by taking possession of the premises with a *bona fide* intention of permanently residing there, and subsequently removing (*Brundage v. Domestic Soc.*, 60 Barb. 204; *Hunt v. Beeson*, 18 Ind. 380); or by going to sea (*Shaw v. Steward*, 1 A. & E. 300); or by temporary absence (*Hart v. Chesley*, 18 N. H. 383; see *McKissick v. Pickle*, 16 Pa. St. 140)—*aliter*, as to an absence of several years (*Crawford v. Patterson*, 11 Gratt. 364); or by the bankruptcy of the devisee (*Goldney's Case*, 3 Deac. 570); or by impossibility of performance through testator's act (*Bunburry v. Doran, Jr.* L. R. (8 C. L.) 516, (9 C. L.) 284; *Hearn v. Cannon*, 4 Houst. 20; *Martin v. Ballou*, 13 Barb. 119; *Lamb v. Miller*, 18 Pa. St. 448; *Walker v. Walker*, 2 De G. F. & J. 255); or by operation of law (*Adams v. Buss*, 18 Ga. 130; *Curry v. Curry*, 30 Ga. 253; *Miller v. Lewis*, 33 Ga. 61; *Tennille v. Phelps*, 49 Ga. 532; *Maddox v. Maddox*, 11 Gratt. 804); or by the voluntary release or waiver of the person entitled to a performance (*Jones v. Bramblet*, 1 Scam. 276; *Petro v. Cassiday*, 13 Ind. 289; *Boone v. Tipton*, 15 Ind. 270; *Rush v. Rush*, 40 Ind. 83; *Crawford v. Woods*, 6 Bush 200; *Wilson v. Wilson*, 38 Me. 18; *Simonds v. Simonds*, 3 Metc. 558; *Spaulding v. Hallenbeck*, 39 Barb. 79; *Brewster v. Brewster*, 4 Sandf. Ch. 22; *Buckmaster v. Needham*, 22 Vt. 617; *Wells v. Wells*, 37 Vt. 483; see *Frost v. Butler*, 7 Me. 225; *Manwell v. Briggs*, 17 Vt. 176; *Hubbard v. Hubbard*, 12 Allen 586).—REP.

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tend them indefinitely ; for it would not even be limited by, and cease with, the annuity. Such construction would give the executor power to sell whenever the daughter should cease to reside on the farm. The testator undoubtedly contemplated no such construction. What he meant was, that in case his daughter should not be willing, at his decease, to enter on the occupancy of the farm as her residence, it should then be sold ; and if sold, it should be sold subject to the annuity, and the proceeds of the sale should go to her. He did not intend to cloud her title with an ever-impending power of sale. The executor has not now, and will not have, any duty in respect to the sale of the farm.

RICHARD WESLING, Administrator,

v.

PETER SCHRASS et al.

To a judgment-creditor's bill to set aside a conveyance of lands, alleged to be fraudulent as against such creditor, to which the grantor (the debtor), his wife and their grantee were made defendants, the wife did not demur, as she might have done, but filed a plea setting forth a sheriff's sale and conveyance of the premises to her, under an execution issued out of this court against her husband and another, before the alleged fraudulent conveyance.—*Held*, on argument of the plea, that it is not good, because it does not set out any order or decree on which the execution issued.

On plea to creditor's bill.

Mr. A. I. Smith, for the plea.

Mr. M. Bretzfeld, contra.

THE CHANCELLOR.

The bill is filed by a judgment-creditor of the defendant, Peter Schrass, against him and his wife and Jacob Lenly, to set aside as

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fraudulent, as against the judgment, a deed of real property in Hudson county, made by Schrass and his wife to Lenly, for property of Schrass, as the bill alleges. The debt on which the judgment was recovered was contracted May 1st, 1871, and the deed is dated October 3d, 1877. Schrass and his wife plead that a writ of *fieri facias de bonis et terris* was issued out of this court September 21st, 1877, against John Kuppler and Schrass, directed to the sheriff of Hudson county, to whom it was delivered, and that under it the sheriff duly sold and conveyed the interest of Schrass in the property in question to Schrass's wife, for \$372, which were paid by her out of her separate estate. The bill neither states this conveyance nor makes any reference to it. Mrs. Schrass does not appear by the bill to have any interest in the property. She appears, by its statements, to have joined her husband in the deed to Lenly merely to bar her dower. According to the bill, she has no interest in this suit, and she might have demurred. The plea does not aver in any way the existence of any decree or order authorizing the issuing of the writ of *fieri facias* under which she claims title to the property. It is therefore defective. But leave will be given to amend on payment of costs.

Executors of JOHN A. CLEMENT, deceased,

v.

JARVIS A. BARTLETT et al.

A statute requiring mortgages to be registered, or to lose their priority as against subsequent judgment-creditors, or *bona fide* purchasers or mortgagees of the same premises, without notice, applies to a mortgage given to the state. A suit for the foreclosure of a mortgage given after, but registered before, one given to the state on the same lands, is a suit "arising out of any previous lien or encumbrance" (*Rev. p. 1223*), to which the state may be made a party, and have its rights in the premises determined.

Bill to foreclose. On final hearing on bill and answer.

Clement's Executors v. Bartlett.

Mr. P. S. Scovel, for complainants.

Mr. J. P. Stockton, attorney-general, for trustees for support of public schools.

THE CHANCELLOR.

The single question presented for consideration by the briefs of counsel is, whether the state is bound by the statute providing for the registration or recording of mortgages of real estate.

On the 8th of October, 1857, Jarvis H. Bartlett gave a mortgage to the "Trustees for the Support of Free Schools," on lands in the county of Burlington, to secure the payment of \$3,000 in one year, with interest. It was not recorded, however, until October 4th, 1866, nearly nine years afterwards. On the 17th of February, 1858, Bartlett gave another mortgage, on the same land, to John A. Clement, to secure the payment of \$2,000 in one year, with interest. That mortgage was duly recorded April 9th, 1858. Between the last-mentioned date and the time of recording the mortgage to the trustees, Bartlett conveyed parts of the mortgaged premises to several persons, by deeds which were duly recorded before the recording of the trustees' mortgage. The answer of the trustees admits that Clement, when he took his mortgage, had no notice of the existence of their mortgage. It alleges that the delay in recording the latter mortgage occurred through "inadvertence or otherwise," and it raises, by way of demurrer, the question above stated.

The counsel for the state urges that inasmuch as a state cannot be sued in its own courts without its consent, in the absence of constitutional or statutory provision (*Am. Dock &c. Co. v. Trustees &c.* 5 *Stew. Eq.* 428), and inasmuch as, as he insists, if the mortgage act is not binding on the state, this suit does not arise out of a "previous lien or encumbrance" to that of the state on the mortgaged premises, this suit cannot be maintained. In the court of chancery of the state of New York it was the ordinary

NOTE.—For cases showing what statutes apply to a state, see *Trustees v. Trenton*, 3 *Stew. Eq.* 667, note.—RMP.

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practice to make the attorney-general a party to a foreclosure suit where the people of the state had a subsequent lien upon the mortgaged premises by judgment or otherwise, so as to give to the purchaser under the decree of foreclosure a perfect title to the premises discharged of the lien of the state. *Garr v. Bright*, 1 Barb. Ch. 157. And in this court the like practice has obtained in such suits in regard to other states holding encumbrances on mortgaged premises. They were made parties in order that they might protect their rights. In *Willink v. Morris Canal Co.*, 3 Gr. Ch. 377, the state of Indiana was made a party under such circumstances. The jurisdiction where liens are held by the state is established by statute. The act entitled "An act to provide for the adjustment of claims in favor of the state," (*Rev. pp. 1223, 1224*), provides that in all cases where the state has any lien or encumbrance upon lands, and a suit is brought arising out of any previous lien or encumbrance thereon, such lien or encumbrance of the state may be brought in question and definitely settled by any court having jurisdiction over the subject matter of the suit. It further provides that in all cases where the lien, encumbrance or priority of encumbrances of the state shall be brought in question on due return of notice directed to the state, and served on the attorney-general, or on due appearance for the state, the suit may proceed as other cases, and a decree or judgment therein shall bind the state the same as if it had been made against an individual; and that the lien of the state, on sale under such decree or judgment, shall be cut off, and the claim of the state shall be made out of the surplus, if any, in the order of priority in which the encumbrance of the state stands.

The act concerning mortgages (*Rev. p. 706*) provides that every deed of mortgage or conveyance in the nature of a mortgage, of or for any lands, tenements or hereditaments, which shall have been made and executed after the 1st day of January, in the year of our Lord 1821, or shall, after the passage of the act, be made and executed, shall be void and of no effect against a subsequent judgment-creditor or *bona fide* purchaser, or mortgagee for a valuable consideration, not having notice thereof, unless such mortgage shall be acknowledged or proved according to law,

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and recorded or lodged for that purpose with the clerk of the court of common pleas of the county in which such lands, tenements or hereditaments are situate, at or before the time of entering such judgment, or of recording or lodging with the clerk, as aforesaid, the said mortgage or conveyance to such subsequent purchaser or mortgagee.

Unless the claim of the state can be maintained on the ground of governmental prerogative, it is obviously insupportable. It cannot be maintained on that ground. *Board of Chosen Freeholders v. State Bank*, 2 Stew. Eq. 268; *Trustees for Support of Public Schools v. Trenton*, 3 Stew. Eq. 683. By the common law, the king himself was bound by an act of parliament intended to give a remedy against a wrong or prevent fraud, even though he was not named in the act. The act under consideration makes no reservation or exception in favor of the state. Its terms are general and sweeping. It existed, and indeed had been long in force, when the respective mortgages of the trustees and the complainants were taken. The former was taken subject to its provisions, and the latter under its protection. The state itself, by the statute, in effect, declared to Clement when he took his mortgage, that if any unregistered or unrecorded mortgage, of which he had no actual notice, existed on the property, it would be void and of no effect against that which he proposed to take thereon.

I am unable to perceive any ground on which the claim now made in behalf of the state can be sustained.

In the matter of the application of THEODORE BARTLES and others, for payment to them of a trust fund under the control of this court.

By a will, proved in 1849, a testator gave to his executor his homestead farm in trust during the life of his daughter (petitioner's mother), to receive the rents and profits, and to pay them to her for her separate use, and to keep the property clear of any encumbrance by her or her husband; and he gave the farm, after her decease, to such person or persons as should be her heir or

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heirs at law of land held by her in fee simple. In 1868 the farm was sold by order of this court, under the act authorizing the sale of lands limited over to infants or in contingency, the proceeds paid into court and invested for the benefit of the parties interested.—*Held*, that such proceeds of sale could not be paid over to her children and heirs at law, on their own application, exhibiting the release of their mother and her consent thereto; nor can they be paid over until after her death, because it cannot until then be determined who are her heirs at law.

On petition.

THE CHANCELLOR.

The petitioners are the children of Phœbe Ann Bartles. Her father, now deceased, by his will, proved in 1849, gave to his executor his homestead farm in Morris county during her life, in trust, to rent it and receive the rents and profits and pay them over as he should receive them, to her, for her separate use, and to keep the property clear of all encumbrances by her or on her account, or by or on account of her then or any future husband, and he gave and devised the farm after her decease to "such person or persons as" should "be her heir or heirs at law of land held by her in fee simple." The farm was sold by order of this court in 1868, under the act to authorize the sale of land limited over to infants or in contingency (*Rev. p. 1052*), and the net proceeds of sale were paid into this court and invested under its direction according to the provisions of that act. Mrs. Bartles is still living, but has released her right and interest to and in the fund to the petitioners, who are all of her children, and they apply for the fund on the ground that having extinguished her life estate they are entitled to the money. That they are not so is entirely clear. The remainder in fee is given at the death of the life tenant to "such person or persons as shall be her heir or heirs at law of land held by her in fee simple:" that is, to those who by law would inherit the property at her death if she died intestate seized thereof in fee. Who those persons will be cannot now be determined. *Nemo est hæres viventis*. She has heirs apparent and presumptive now, but whether those persons will be her heirs at her death and so entitled to the remainder, cannot

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be told until that time arrives. The testator manifestly did not refer to any particular individual or individuals, or class of existing persons, by the language which he employed, but used the word "heir" in the technical sense, as is particularly evident from his use of the future tense—"such person or persons as shall be her heir or heirs at law, &c."—that is, such person or persons as shall be her heir or heirs at law when she dies.

The petition must be dismissed.

NOTE.—Under *nemo est heres viventis*, a testamentary gift to the heirs of A during A's lifetime is void 3 Greenl. Cruise *106 § 37; 2 Jarm. on Wills *13 et seq.; *Osio v. Prince*, 19 Gray 582; *Stith v. Barnes*, 1 Law Repor. (N. C.) 484; *Johnson v. Smith*, 2 Id. 592; *Norris v. Hendley*, 27 Cal. 420, 450; *Campbell v. Burdick*, 18 N. Y. 412, 416.

But if A be referred to in the will as a living person, a gift to his heirs is valid *James v. Richardson*, 1 Ventr. 334; *Goodright v. White*, 2 W. Bl. 1010; *Winter v. Perratt*, 5 B. & C. 48; *Carne v. Roche*, 7 Bing. 226; *Darbison v. Beaumont*, 1 P. Wms. 259; *Vannorndell v. Van Deventer*, 51 Barb. 137; *Heard v. Horton*, 1 Denio 165; *Cushman v. Horton*, 59 N. Y. 149; *Osbey v. Lee*, 2 Dism. 460; *Jourdain v. Green*, 1 Der. Eq. 270; *Leritt v. Wood*, 17 Grant's Ch. 414; *Knight v. Knight*, 3 Jones Eq. 167; *Simms v. Garrett*, 1 Der. & Bat. Eq. 393; *Ward v. Stone*, 2 Der. Eq. 509; *Stith v. Barnes*, 1 Law Repor. 484; or, in case the term heirs is evidently used as *designatio personarum*. *Same v. Garlick*, 14 M. & W. 638; *Baker v. Tucker*, 3 H. of L. Cas. 106; *Ritton v. Sturdy*, 1 Jur. (N. S.) 771; *Boxers v. Porter*, 4 Pick. 198; *Johnson v. Whiton*, 118 Mass. 340; *Morton v. Barrett*, 22 Me. 257; *Williamson v. Williamson*, 18 B. Mon. 370; *Rapp v. Matthias*, 35 Ind. 332; *Butler v. Heustis*, 68 Ill. 594; *Bailey v. Patterson*, 3 Rich. Eq. 156; *Caulk v. Fox*, 13 Fla. 148, 161; *Ware v. Richardson*, 3 Md. 505; *Roberts v. Ogbourne*, 37 Ala. 174; *Myers v. Anderson*, 1 Strobb. Eq. 444; so where the term heirs is qualified, as heirs of the body, right heirs, &c. *Nightingale v. Quarterly*, 1 T. R. 630; *Sweet v. Herring*, 1 East 264; *Darbison v. Beaumont*, 3 Bro. P. C. 60; *Doe v. Laning*, 2 Burr. 1100; *Tucker v. Adams*, 14 Ga. 548; *Sharman v. Jackson*, 30 Ga. 224; *Tipton v. La Rose*, 27 Ind. 484; *Grout v. Townsend*, 2 Hill 554; *Bradford v. Howell*, 42 Ala. 422; *Lemarks v. Glover*, 1 Rich. Eq. 141).

The grantee in a deed must be in existence and certain, therefore a grant to a dead man is void (*Hunter v. Watson*, 12 Chl. 363; *McCracken v. Beall*, 3 A. K. Marsh. 208; *Galloway v. Finley*, 12 Pet. 264; see *Holden v. Smallbroke Vaughn*, 199); or to a fictitious person (*Thomas v. Wyatt*, 25 Mo. 24, 31 Mo. 188; *Phelps v. Call*, 7 Ired. 262; *Muskingum Co. v. Ward*, 13 Ohio 120; *Smith v. Bridger*, *Breeze* 2); or to one unborn (*Newson v. Thompson*, 2 Ired. 277; *Dupree v. Dupree*, *Busb. Eq.* 164; *Hall v. Thomas*, 3 Strobb. 101; *Hamilton v. Pitcher*, 53 Mo. 334); although in *Nelson v. Iverson*, 24 Ala. 9, the property in a slave delivered by a father to his daughter to belong to her child, with which

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she was then pregnant, should it be a boy, was held to vest in such boy at his birth.

A grant to the heirs of a deceased person is good (*Shaw v. Loud*, 12 Mass. 447; *Boone v. Moore*, 14 Mo. 420; *Gearhart v. Sharp*, 9 B. Mon. 31; see *Sargent v. Simpson*, 8 Me. 148; *Duncan v. Harper*, 4 Rich. (N. S.) 84).

A deed to the heirs of a living person is, ordinarily, void (*Hall v. Leonard*, 1 Pick. 27; *Morris v. Stephens*, 46 Pa. St. 200; *Winslow v. Winslow*, 52 Ind. 8; *Norsom v. Thompson*, 2 Ired. 277); yet if such intent be apparent from the instrument, who are the beneficiaries may be shown (*Hogg v. Odom*, Dud. 185; *Martin v. Youngblood*, 8 Humph. 581; *Gearhart v. Sharp*, 9 B. Mon. 34; *Huss v. Stephens*, 51 Pa. St. 282; *Huss v. Morris*, 63 Pa. St. 367; *Flint v. Steadman*, 36 Vt. 210; *Hickman v. Quinn*, 6 Yerg. 95; see further *Epperson v. Mills*, 19 Tex. 65; *Cole v. Lake Co.*, 54 N. H. 290); thus a deed to the joint heirs of A and B, the grantor's daughter and son in law, was held good as to the two children of A and B, then living, but not as to any subsequently born (*Holeman v. Fort*, 3 Strobb. Eq. 66).

A note payable to the heirs of a living person is valid (*Bacon v. Fitch*, 1 Root 181; *Lockwood v. Jesup*, 9 Conn. 272; *Cox v. Beltzhoover*, 11 Mo. 142; but see *Bennington v. Dinsmore*, 2 Gill 348).

A deed to S. or his heirs is good (*Ready v. Kearsley*, 14 Mich. 215; *Hogan v. Page*, 2 Wall. 605; see *Curhart v. Miller*, 2 South. 573); or a bond payable to A or B (*White v. Hancock*, 2 C. B. 830; *Hazen v. Drummond*, 4 Allen (N. B) 267; *Parker v. Carson*, 64 N. C. 563); but not a promissory note (*Musselman v. Oakes*, 19 Ill. 81; *Blanckenhagen v. Blundell*, 2 B. & Ald. 417; *Osgood v. Pearson*, 4 Gray 455; *National Ins. Co. v. Allen*, 116 Mass. 400; *Hayden v. Snell*, 9 Gray 365; *Willoughby v. Willoughby*, 5 N. H. 244; see *Doak v. Robinson*, 1 Hannay 278).

In a conveyance to an unmarried woman and her children, she takes a life estate with a remainder to her after-born children, if any (*Fales v. Currier*, 55 N. H. 392; *Frazer v. Supervisors*, 74 Ill. 282; see *Chessun v. Smith*, 2 Law Repos. (N. C.) 392).

If to a married woman and her children, those subsequently born do not take (*Ayton v. Ayton*, 1 Cox 327; *Stroman v. Rottenburg*, 4 Desauss. 268; *Hogg v. Odom*, Dud. 185; *Grimes v. Orrand*, 2 Heisk. 298; *Holeman v. Fort*, 3 Strobb. Eq. 66; *Kitchens v. Craig*, 1 Bail. 119); unless a contrary intent appears (*Lillard v. Ruckers*, 9 Yerg. 64; *Read v. Fite*, 8 Humph. 328; *Shepherd v. Nabors*, 6 Ala. 631; *Watts v. Clardy*, 2 Fla. 369; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Woodruff v. Woodruff*, 32 Ga. 358; *Houghton v. Kendall*, 7 Allen 72; *Foster v. Shreve*, 6 Bush 519; *Simms v. Garrott*, 1 Dev. & Bat. Eq. 393; *Bullock v. Bullock*, 2 Dev. Eq. 307; *Noe v. Miller*, 4 Stew. Eq. 234).

A life tenant's covenant indemnifying one against damage and loss by reason of suits by the covenantor's heirs, executors or administrators, was held not to include such covenantor's children (*Pearson v. Darrington*, 32 Ala. 227, 275).

A mere contingent interest is subject to legislation, affecting or destroying it before it becomes vested (*Beall v. Beall*, 8 Ga. 210; *Scott v. Key*, 11 La. Ann. 232; *Sleight v. Read*, 9 How. Pr. 278; *Aspden's Estate*, 2 Wall. Jr. 368; *Barnes*

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v. Huson, 60 Barb. 558; *Dixon v. Dixon*, 4 La. Ann. 191; *Marshall v. King*, 24 Miss. 85; *Hill v. Chambers*, 50 Mich. 422; *Price v. Taylor*, 23 Pa. St. 95; *McGunnigle v. McKee*, 77 Pa. St. 81; see, however, *Coleman v. Reed*, Walk. 258; *Sinclair v. Jackson*, 8 Crc. 543; *Gilpin v. Williams*, 25 Ohio St. 283; *Dunn v. Sargent*, 101 Mass. 336; *Shonk v. Brown*, 61 Pa. St. 320; *Van Tilburgh v. Hollinshead*, 1 McCart. 32).

An heir cannot convey his interest or expectancy in his ancestor's estate, before such ancestor's decease, or the happening of the contingency (*Sallings v. Richmond*, 5 Allen 187; *Jackson v. Bradford*, 4 Wend. 619; *Tooley v. Dibble*, 4 Hill (N. Y.) 641; *Whitney v. Rust*, 1 Gratt. 483; *Arrington v. Arrington*, 2 Leno Repor. (N. C.) 253; *Dennett v. Dennett*, 40 N. H. 498; *Vance v. Vance*, 21 Me. 364; *Grogan v. Garrison*, 27 Ohio St. 50; *Striker v. Mott*, 23 N. Y. 82; *Ludewig's Case*, 3 Rob. (La.) 99; *Beard v. Griggs*, 1 A. K. Marsh. 26; *Boynnton v. Hubbard*, 7 Mass. 112; *Hun v. Chaffee*, 14 N. H. 215; *Blanchard v. Brooks*, 12 Pick. 47; *Barkadule v. Gamage*, 3 Rich. Eq. 271; *Breuer v. Baxter*, 41 Ga. 212; *Hart v. Gregg*, 32 Ohio St. 502; *Pelletreau v. Jackson*, 11 Wend. 110; *Robertson v. Wilson*, 38 N. H. 48; *Hull v. Nate*, 38 N. H. 422; *Edwards v. Varick*, 5 Denio 664); or mortgage it (*Bayler v. Com.*, 40 Pa. St. 37; *Carlton v. Leighton*, 3 Meriv. 667; *Purcell v. Mather*, 35 Ala. 570; see *Batty v. Lloyd*, 1 Vern. 141; *Cook v. Field*, 15 Q. B. 475; *John Street*, 19 Wend. 659; *Hamilton v. Pitcher*, 53 Mo. 334; *Bacon v. Bonham*, 12 C. E. Gr. 209). As to post obits see 1 Story's Eq. Jur. §§ 342-348; *Lushington v. Wallis*, 1 H. Bl. 94; *Spencer v. Jansen*, 2 Ves. Sr. 125; *Cooke v. Lamotte*, 15 Bear. 234; *Beynon v. Cook*, L. R. (10 Ch.) 389; *Miller v. Cook*, L. R. (10 Eq.) 641).

Equity, however, will enforce an executory contract to convey such contingent interest to third persons, provided it be fair and bona fide (*Hopson v. Trevor*, 1 Strange 533; *Phipson v. Turner*, 9 Sim. 245; *Hinde v. Blake*, 3 Bear. 234; *Westby v. Westby*, 2 Dr. & War. 502; *Ridgeway v. Underwood*, 67 Ill. 419; *McLoughlin v. Muher*, 17 Hun 215; *Smallman's Estate*, Ir. L. R. (8 Eq.) 249; *Cook v. Field*, 15 Q. B. 460; *Martin v. Marlow*, 65 N. C. 695; *Nesmith v. Dinsmore*, 17 N. H. 515; *Trull v. Eastman*, 3 Metc. 121; *Russ v. Alpaugh*, 118 Mass. 376; *Curtis v. Curtis*, 40 Me. 24; *McDonald v. McDonald*, 5 Jones Eq. 211; *Stover v. Eyselshimer*, 46 Barb. 84, 3 Keyes 620); especially if made to the ancestor (*Cox v. Belitha*, 2 P. Wms. 272; *Persse v. Persse*, 7 Cl. & Fin. 279; *Quarles v. Quarles*, 4 Mass. 680; *Jones v. Jones*, 46 Iowa 466; *Firestone v. Firestone*, 2 Ohio St. 415; *Needles v. Needles*, 7 Ohio St. 432; *Fitzgerald v. Vestal*, 4 Sneed 258; *Parsons v. Ely*, 45 Ill. 232; *Havens v. Thompson*, 11 C. E. Gr. 383); or to another heir (*Wethered v. Wethered*, 2 Sim. 183; *Marwood v. Tooke*, Id. 192; *Hyde v. White*, 5 Sim. 524; *Jeeffers v. Lampson*, 10 Ohio St. 101; *Coates Street*, 2 Ashm. 12; *Walker v. Walker*, 67 Pa. St. 185; *D'Wolf v. Gardiner*, 9 R. I. 145; *Miller v. Emans*, 19 N. Y. 384; *Lewis v. Madison*, 1 Munf. 303; *Johnson v. Hubbell*, 2 Stock. 332; *Smith v. Artell*, Saxt. 494); or with the ancestor's express consent (*Fitch v. Fitch*, 8 Pick. 480; *Jenkins v. Stetson*, 9 Allen 127; *Lee v. Lee*, 2 Duv. 134; *McBee v. Myers*, 4 Bush 356).

But equity does not always enforce such assignments (*Meek v. Kettlewell*, 1 Phil. 342; *Lowry v. Spear*, 7 Bush 451; *Wheeler v. Wheeler*, 2 Metc. (Ky.) 474;

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Hardin v. Smith, 7 B. Mon. 392; *Mercier v. Mercier*, 50 Ga. 546; and may impose terms (*Gwynne v. Heaton*, 1 Bro. C. C. 1).

As to the mode of alienating such interest, see *Dorsey v. Smith*, 7 Harr. & Johns. 345; *Bennett v. Morris*, 5 Rawle 9; *Lintner v. Snyder*, 15 Barb. 621; *Wilson v. Wilson*, 32 Barb. 328; *Ackerman v. Vreeland*, 1 McCart. 23; *Faber v. Police*, 10 Rich. (N. S.) 376; *McElwee v. Wheeler*, Id. 392; *Roof v. Fountain*, 20 Barb. 527; *McClure v. McClure*, 1 Phila. 117; *Hopper v. Demarest*, 1 Zab. 525.

A tenant by curtesy initiate may convey his interest in lands (*Reaume v. Chambers*, 22 Mo. 36; *Jackson v. Mancius*, 2 Wend. 357; *McCorry v. King*, 3 Humph. 267; *Evans v. Kingsberry*, 2 Rand. 120; *McClain v. Gregg*, 2 A. K. Marsh. 457; see *Oldham v. Henderson*, 5 Dana 254); or one who has "entered" a tract of land before receiving his patent therefor (*Hayward v. Ormsbee*, 11 Wis. 3; *Harmer v. Morris*, 1 McLean 44; *Bledsoe v. Little*, 4 How. (Miss.) 13; *Lamb v. Kanna*, 1 Sawy. 238; *Curroll v. Norwood*, 4 H. & McH. 287; *Graham v. Henry*, 17 Tex. 164; *Cobb v. Stewart*, 4 Metc. (Ky.) 255); or after an entry for condition broken (*Homer v. Chicago R. R.*, 38 Wis. 165; 2 *White & Tudor's Lead. Cas.* (4th ed.) 1609; *Southard v. Central R. R.*, 2 Dutch. 13; *Rice v. Boston R. R.*, 12 Allen 141; *Boone v. Tipton*, 15 Ind. 270; *Underhill v. Saratoga R. R.*, 20 Barb. 455).

An heir whose title is abated by a stranger cannot devise it before entry. *Hall v. Hall*, 3 Call 488; 1 *Jurm. on Wills* (5th Am. ed.) 153; see *Watts v. Cole*, 2 Leigh 664; *Varick v. Jackson*, 2 Wend. 166; *Herrington v. Budd*, 5 Denio 321; *Leach v. Jay*, L. R. (6 Ch. Div.) 496, (9 Ch. Div.) 42; nor one who has a mere possibility of reverter (*Deas v. Horry*, 2 Hill Ch. 248; *Miller v. McNair*, 11 Iowa 525; see *Fowler v. Griffin*, 3 Sandf. 385).

A possibility coupled with an interest is devisable or descendible (*Manners v. Manners*, Spen. 142; *Thornton v. Roberts*, 3 Stew. Eq. 476; *Kean v. Hoffecker*, 2 Harring. 103; *Thompson v. Hoop*, 6 Ohio St. 480; *Lewis v. Kemp*, 1 Ired. 145; *Pond v. Bergh*, 10 Paige 140, 153 and cases cited; *Davis v. Bawcum*, 10 Heisk. 406; *Woodgate v. Fleet*, 44 N. Y. 1; *Ingilby v. Amcotts*, 21 Beav. 585; *Moor v. Hawkins*, 2 Eden 342; *Austin v. Cambridgeport*, 21 Pick. 215; 4 Kent 512; *Winslow v. Goodwin*, 7 Metc. 363; *Smith v. Sweringen*, 26 Mo. 551; *McDonald v. McMullen*, 2 Hills 91; see *Bigelow v. Wilson*, 1 Pick. 493; *Grayson v. Sandford*, 12 La. Ann. 646); but not a bare possibility, as if a conveyance be to A and B and the survivor, A has no interest to assign during B's lifetime (*Doe v. Tomkinson*, 2 M. & Sel. 165; *Jackson v. Waldron*, 13 Wend. 178; *O'Brien's Case*, 1 Jon. & Lat. 352; *Decker v. Saltsman*, 1 Hun 421, 59 N. Y. 275; see *MacAdam v. Logan*, 3 Bro. C. C. 310; *Thomas v. Jones*, 1 De G. J. & S. 63; *Miller v. Emans*, 19 N. Y. 384; *Wilson v. Wilson*, 32 Barb. 328).

No act of the life tenant, or trustee of such life tenant, can affect the rights of the remaindermen. (*Putnam v. Gleason*, 99 Mass. 454; *Noble v. Andrews*, 37 Conn. 346; *Jackson v. Edwards*, 22 Wend. 498; *Frazer v. Supervisors*, 74 Ill. 282; *Ernison v. Whittlesey*, 55 Mo. 254; *Austin v. Rutland R. R.*, 45 Vt. 215; *Feltman v. Butts*, 8 Bush 115; *List v. Rodney*, 83 Pa. St. 483; *Hosmer v. Carter*, 68 Ill. 98; *Wilkins v. Kirkbride*, 12 C. E. Gr. 93; *Booraem v. Wells*, 4 C.

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E. Gr. 87; see *Knight v. Weatherwax*, 7 *Paige* 182; *Iler v. Whitfield*, *Phil. (N. C.)* 493; *Hall v. Want*, *Id.* 502; *Baylor v. De Jarnette*, 13 *Gratt.* 152; *Stephens v. Evans*, 30 *Ind.* 39; *Hamilton v. Pitcher*, 53 *Mo.* 334; *Lewis v. Nelson*, 4 *Mich.* 630; *Garner v. Dowling*, 11 *Heisk.* 48; *Allen v. Allen*, 2 *Tenn. Ch.* 28; *Murell v. Mathews*, 2 *Bay* 397).

But statutory proceedings authorizing courts to convey or release estates in expectancy, &c., are valid. (*Beisley v. Carter*, *L. R. (4 Ch.)* 230; *Barnett v. Mozon*, *L. R. (20 Eq.)* 182; *Wills v. Slade*, 6 *Ves.* 498; *Gaskell v. Gaskell*, 6 *Sim.* 643; *Mead v. Mitchell*, 17 *N. Y.* 210; *Williman v. Holmes*, 4 *Rich. Eq.* 475; *Faulkner v. Davis*, 18 *Gratt.* 651; *Loyless v. Blackshear*, 43 *Ga.* 327; *Reinders v. Koppelman*, 68 *Mo.* 482; *Nutter v. Russell*, 3 *Metc. (Ky.)* 163; *Taylor v. Binke*, 109 *Mass.* 513; *Dodd's Case*, *Phil. (N. C.) Eq.* 97; *Mickle's Case*, 10 *C. E. Gr.* 53; *Chism v. Keith*, 1 *Hun* 589).

A contingent remainder cannot be seized on execution. (*Allen v. Scurry*, 1 *Yerg.* 36; *Dargan v. Richardson*, *Dud.* 62; *Penn v. Spencer*, 17 *Gratt.* 85; *Watson v. Dodd*, 68 *N. C.* 528; *Jackson v. Middleton*, 52 *Barb.* 9; *Perkins v. Clack*, 3 *Head* 734; *Allston v. Bank*, 2 *Hill Ch.* 242; *Baker v. Copenbarger*, 15 *Ill.* 103; *Ridgeway v. Underwood*, 67 *Ill.* 430; *Striker v. Mott*, 28 *N. Y.* 82; see *Lockwood v. Nye*, 2 *Swan* 515; *Payn v. Beal*, 4 *Denio* 405; *Woodgate v. Fleet*, 44 *N. Y.* 1; *Sheridan v. House*, 4 *Abb. Ap.* 218; *Bolton v. Stretch*, 3 *Stew. Eq.* 536).

What contingent interests pass under an insolvent or bankrupt assignment, see *Inkson's Trusts*, 21 *Beav.* 310; *Irison v. Gassiot*, 27 *Eng. L. & E.* 483; *Duggan's Trusts*, *L. R. (8 Eq.)* 697; *Mitchell v. Hughes*, 6 *Bing.* 689; *Burn v. Carvalho*, 1 *Ad. & El.* 883; *Gibbins v. Eyden*, *L. R. (7 Eq.)* 371; *Higden v. Williamson*, 3 *P. Wms.* 131; *Mudge v. Rowan*, *L. R. (3 Erch.)* 185; *Blakemore's Case*, *L. R. (5 Ch. Div.)* 372; *Davis's Case*, *Mont.* 297; *Naden's Case*, *L. R. (9 Ch.)* 670; *Nimmo v. Davis*, 7 *Tex.* 26; *Outcalt v. Van Winkle*, 1 *Gr. Ch.* 513; *Sanford v. Lackland*, 2 *Dill.* 6; *Krumbaar v. Burt*, 2 *Wash. C. C.* 406; *Kinzie v. Winston*, 56 *Ill.* 56; *Banks v. Ogden*, 2 *Wall.* 57; *Butler v. Merchants Ins. Co.*, 8 *Ala.* 146; *Shay v. Sessaman*, 10 *Pa. St.* 432; *Moth v. Frome*, *Amb.* 394; *Vizard's Trusts*, *L. R. (1 Eq.)* 667, (1 *Ch.*) 588; *Lee v. Olding*, 2 *Jur. (N. S.)* 850; *Rash's Estate*, 2 *Pars.* 160; *Stucker v. Harrey*, 1 *Miles* 247; *Shaw v. Steward*, 1 *A. & E.* 300; *Grow v. Creditors*, 31 *Cal.* 328; *Rowan v. Harrison*, 2 *Pug.* 503.

For instances of assignments of expectancies, &c., under statutory provisions, see *Moore v. Littel*, 40 *Barb.* 488, 41 *N. Y.* 66; *Sheridan v. House*, 4 *Abb. Ct. of App. Dec.* 218; *Stover v. Eycleshimer*, 3 *Keyes* 620; *Goodell v. Hibbard*, 32 *Mich.* 47; 4 *Kent* *512; *Turpin v. Turpin*, *Wythe* 22 (137); *Lawrence v. Bayard*, 7 *Paige* 70; *Lacland v. Nevins*, 3 *Mo. App.* 335.—REP.

Hoboken Bank v. Beckman.

THE HOBOKEN BANK FOR SAVINGS.

v.

PETER H. BECKMAN et al.

1. Mortgaged premises were sold, and a decree for deficiency taken against the mortgagor. Thirteen days before such sale, the mortgagor conveyed all his lands, valued at \$50,000, to his two sons, one of them a minor, in satisfaction of an alleged indebtedness of \$8,000 to them, no other debts being shown.—*Held*, fraudulent as against the mortgagee.

2. Although an answer, under oath, denying fraud, be not overcome by the testimony of two witnesses, or what is equivalent thereto, yet such answer, if it contain admissions of facts from which fraud follows as a natural and legal, if not a necessary and unavoidable conclusion, does not disprove such fraud. (a)

Creditor's bill. On final hearing on pleadings and proofs.

Mr. F. B. Ogden for complainant.

Mr. R. Parmley and *Mr. H. S. White*, for defendants

THE CHANCELLOR.

The bill states, and it is admitted, that the complainant, on the 8th of August, 1878, obtained a decree of this court for foreclosure and sale of real property, mortgaged to it by the defendant, Peter H. Beckman, under execution issued, on which the property was sold March 27th, 1879; that the decree for foreclosure contained the usual personal decree for deficiency against the mortgagor; that there was a deficiency of \$1,360; that execution for the deficiency was issued April 4th, 1879, and that it was returned, wholly unsatisfied, on the 9th of that month. On the 14th of that month, thirteen days before the sale of the mortgaged premises, Beckman conveyed all his property, consisting of several different parcels of valuable real estate in Hudson county, to his two sons, the defendants, Henry and William

(a) NOTE.—See *Sayre v. Fredericks*, 1 C. E. Gr. 205; *How v. Camp*, Walk. Ch. 427.—REP.

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Beckman. The deed expresses a consideration of \$7,758.88. The proof is, that the property so conveyed is worth \$53,250. It is true it is alleged (it is not proved except by the production, by the defendants, of certain deeds and a declaration of sale), that a part of the property, valued at \$29,050, is held under tax title merely, and it is alleged that it is subject to taxes and assessments for municipal improvements also. It is also alleged that the rest of the property, valued at \$24,200, is subject to mortgages amounting to \$16,525, and a copy of the record or registry of mortgages appearing to be on the property, is offered, but no proof is given as to the amount due thereon. It is alleged, too, that that property is subject to taxes and assessments to the amount of \$3,828.95, and bills for taxes and assessments upon it to that amount are put in evidence, but, beyond them, there is no evidence on the subject. The bill alleges that the consideration of the deed from Beckman and his wife to his sons was false and fictitious, and that no consideration actually passed between the grantor and grantees for the conveyance; that the grantees are both young men of no financial ability, and that one of them is a minor. It calls for answer on oath, and the defendants have so answered. In substance, they allege that the boys kept a livery stable and undertaker's establishment, and their father managed the business for them; that he collected more money in it than he paid out, and owed them a large sum on account of his collections; that they frequently asked him to come to an account, but never could get him to do so until the day of the date of the deed to them, and that the consideration stated in the deed was the amount then found to be due to them from him. This meagre statement is all that is given by the defendants in support of a transaction which is abundantly suspicious on its face. Though the bill alleges that the father was indebted to others besides the complainant, the answer denies it as to all other persons than the sons, alleging that, except the debts of the complainant and the sons, he did not owe a dollar. So that within less than two weeks prior to the foreclosure sale, with a decree for deficiency against him, Beckman, the mortgagor, conveyed all his real estate to his two sons, in consideration of an alleged debt

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from him to them of nearly \$8,000, and he did not, he says, owe a dollar to any one except them and the complainant. Nor, so far as appears, was there any evidence of the alleged debt to the sons. Nor does there appear to have been any discharge of it, if it existed. It appears by the testimony that when, after the conveyance, one of the sons was asked, by the president of the complainant, what consideration was paid for the conveyance, he answered that he "did not know; that it was not fixed up yet; that it was on their books." And when the president asked him if he paid any money to his father, he replied that he "could not tell; it was not fixed up yet." And in the same conversation he said he was working for his father. That he made those replies is not denied. Why the father should have conveyed all his property to his sons in satisfaction of the alleged debt, instead of securing their debt thereon, does not appear. Nor does it appear that they were pressing or even urging him to secure or satisfy their debt. There does not appear to have been any valuation of the property or any price fixed upon it. A transaction so suspicious cannot escape the condemnation of the court.

The defendants insist that, having answered under oath as required, their answer, so far as it is responsive, is to be taken as conclusive unless overcome by the testimony of two witnesses, or what is equivalent thereto. But a denial by the answer, in such a case as this, of the existence of fraud, will not avail to disprove it where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable conclusion. Here the answer admits that there was a decree for foreclosure and sale, and a personal decree for deficiency against the mortgagor; that a few days before the sale took place he conveyed a very large amount of property to his two sons (one of whom was a minor), with whom he was concerned in business, as manager, according to the answer. No account is given of the particulars of the alleged debt, but it is merely averred that there was an account, and that the consideration of the conveyance was the amount found due thereon. It is not alleged that the amount of the consideration as expressed in the deed was, in fact, due. The value of the property conveyed is shown to be \$50,000,

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while the alleged debt was less than \$8,000). No satisfactory proof is offered to show that the apparent disparity between the value of the property and the alleged debt did not, in fact, exist. As to the difference between the amount of the alleged debt, if it existed, and the greater value of the property, the conveyance was a fraud on the complainant. When the value of the property was established at nearly seven times the amount of the debt, it was incumbent on the defendants to show, by satisfactory proof, that the disparity did not, in fact, exist. Besides, the time when and the parties between whom the conveyance was made, and the character of the transaction as detailed in the answer, all show that, notwithstanding the denial of the answer, the conveyance was designed to defraud the complainant. It will be set aside accordingly as against the complainant's debt.

JAMES S. BIBBY

v.

SARAH BIBBY.

In a suit by a husband for divorce on the ground of his wife's adultery, the fact that the alleged paramour of the wife was within reach of process at the time of examining the witnesses, and was not called to testify on behalf of the wife's innocence, is significant, and corroborative of the other witnesses' testimony as to her guilt.

Petition for divorce. On final hearing on pleadings and proofs.

Mr. S. Tuttle, for petitioner.

Mr. W. H. Francis, for defendant.

The chancellor, after reviewing the testimony, concluded that the adultery of the wife had been sufficiently proved to decree a divorce in the husband's favor. He then said:

Flaacke v. Jersey City.

THE CHANCELLOR.

While the defendant was not a competent witness in her own behalf to disprove the imputed adultery, Young, her alleged paramour, was, and he appears to have been in Paterson during the examination of witnesses in this cause. He might have been called, but was not. The defendant has chosen rather to come to the hearing without his testimony. The fact that she did not call him is an important circumstance in corroboration of the testimony of the Mellors, and of much significance in reaching a conclusion as to her guilt.

There will be a decree of divorce.

HENRY FLAACKE

v.

THE MAYOR AND ALDERMEN OF JERSEY CITY and others.

1. A solicitor who is a party to a suit and appears in his own behalf, is entitled to the allowances made by the fee bill for his services therein, except a retaining fee.

2. Certain items of costs and their taxation and allowance considered.

3. The act of 1879 (*P. L. of 1879 p. 103*) only applies to the clerk's fees on papers bearing specified endorsements, and not to affidavits of verification and schedules attached to bills or answers.

Motion for retaxation of costs.

Mr. S. B. Ransom, for the motion.

Mr. S. C. Mount, contra.

THE CHANCELLOR.

The complainant objects not only to certain items of the bills of costs as taxed for the defendants Andrew B. Church and S. C. Mount respectively, on the ground that the allowances are

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greater than the law authorizes, but insists that Mr. Mount, who is a solicitor of this court, and appeared in the cause in his own person, is not entitled to any costs, because he did not appear by solicitor. The objections cannot be sustained. A solicitor who is a party to a suit and appears in his own person, is entitled to the allowances made by the fee bill for his services therein, except, of course, for a retaining fee. *Willard v. Harbeck*, 3 Denio 260.

The objections made to the items of the bill are directed to the number of folios charged for papers drawn or copies obtained, which it is claimed is excessive; to the allowance made for drawing, engrossing and taxing costs, which it is insisted is more than is allowed by law for the respective services rendered; to the allowance to the clerk for entering appearance, and to the allow-

NOTE.—Officers may not detain papers or records until their fees are paid. *Anon.*, *Dickinson's Prec.* 24; *Taylor v. Lewis*, 2 Ves. 111; *Hayne v. Watts*, 3 Swanst. 93; *Wuit v. Schoonmaker*, 15 How. Pr. 460; *Young v. Sutton*, 2 V. & B. 365; *Rex v. Bury*, Doug. 185, note; see *Owen's Case*, 2 Ves. 25; *Farewell v. Coker*, 2 P. Wms. 460; nor the body, after a *habeas corpus*, *Hopman v. Barber*, 2 Str. 814.

A party not a practicing attorney or solicitor cannot be entitled to costs for practicing. *French v. Morgan*, 1 Hogan 230; *Stewart v. N. Y.*, 10 Wend. 597; *People v. Steuben*, 12 Wend. 200; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Gillis v. Holly*, 19 Ala. 663. In *Gordon v. Scott*, 2 Bank. Reg. 28, a party serving the subpoenas on his own witnesses was held entitled to the costs therefor. See *Anon.*, *Hal. Dig.* 240 § 8.

Nor one pretending to be an attorney, but who has never been admitted. *Coates v. Hawkyard*, 1 Russ. & Myl. 746; *Willett v. Lord Clifton*, Glassc. 254; *Humphreys v. Harvey*, 1 Bing. N. C. 62; *Jones v. Hayman*, Barn. 46; *Ames v. Gilman*, 10 Metc. 239; *Perkins v. McDuffee*, 63 Me. 181; *Tedrick v. Miner*, 61 Ill. 189; *Robb v. Smith*, 3 Scam. 46; see *Stevens v. Fuller*, 55 N. H. 443.

A solicitor's being temporarily uncertificated will not estop him. *Jones's Case*, L. R. (9 Eq.) 63; *Prior v. Moore*, 2 M. & S. 605; see, however, *Sparling v. Brereton*, L. R. (2 Eq.) 64; *Angell's Case*, 6 D. & L. 144; *Fullalove v. Parker*, 8 Jur. (N. S.) 1078; *Young v. Dowlman*, 3 You. & Jer. 24; nor affect the rights or liabilities of the parties to the suit, who are not attorneys, *Reader v. Bloom*, 10 Moore 261, 3 Bing. 9; *Hope's Case*, L. R. (7 Ch.) 766.

An admission in another court has sometimes been deemed sufficient. *Wilkinson v. Diggell*, 1 B. & C. 158; *Hulls v. Lea*, 10 Q. B. 940; see *Evans v. Duncombe*, 1 Cr. & Jer. 372; *Hill v. Sydney*, 7 Ad. & El. 956.

Attorneys who are partners should all be admitted in the courts in which they practice. *Willett v. Lord Clifton*, Glassc. 254; *Hittson v. Browne*, 3 Col. 304. Yet it seems sufficient to recover, that one of them has been admitted in the court where the services were rendered. *Arden v. Tucker*, 4 B. & Ad. 815;

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ance to him of separate filing-fees for the answer and the affidavits and schedules annexed thereto. The objection to the charge for drawing, taxing and filing costs is that the charge is \$1.85, while it should be only eighty-nine cents, made up as follows: thirty cents to the solicitor for drawing the bill of costs; thirty-eight cents to the clerk for taxing it; nine cents for filing, and twelve cents for a copy. The solicitor is entitled to thirty cents a folio for drawing the bill. If the bill be estimated at three folios, as it appears to have been in this case (and whether such estimation is right or not is a mere matter of computation), the solicitor would be entitled to ninety cents for drawing it. The clerk performing the solicitor's work, at his request, charges him for it the fees to which the latter is entitled; and for convenience in keeping accounts

Harland v. Lilienthal, 53 N. Y. 438; *Turner v. Reynell*, 14 C. B. (N. S.) 328; *Meadowcroft v. Holbrooke*, 1 W. Bl. 50; see *McGill v. McGill*, 2 Metc. (Ky.) 258; *Klingensmith v. Kepler*, 41 Ind. 341; *Jones v. Page*, 44 Ala. 657.

The omission to obtain a license from the United States does not disqualify an attorney as to costs. *Harrington v. Edwards*, 17 Wis. 586; nor the omission of a stamp from his certificate, *Middleton v. Chambers*, 1 M. & G. 97.

Proceedings against one not an attorney, if he held himself out to the plaintiff as such, will not be set aside. *Lloyd v. Fenton*, Hay. & Jon. 35.

In a suit against an attorney he cannot conduct his defence both in person and by attorney. *Robinson v. Palmer*, 2 Allen (N. B.) 223; *Moscatti v. Lawson*, 1 M. & Rob. 454; *New Brunswick R. R. v. Conybeare*, 9 H. of L. Cas. 711; but see *Bolan v. Egan*, 2 Brev. 426; *Johns v. Bolton*, 12 Pa. St. 339; *Branson v. Curuthers*, 49 Cal. 374; *Cobbett v. Hudson*, 1 El. & Bl. 11.

An executor, administrator, guardian or trustee, who is also an attorney, cannot recover for professional services rendered the estate. 3 Wms. on Exrs. (6th Am. ed.) 1854 (y) &c., 1861 (m); *Willard v. Bassett*, 27 Ill. 37; *Key's Estate*, 5 La. Ann. 567; *Allen v. Jarvis*, L. R. (4 Ch.) 616; *Spinks v. Davis*, 32 Miss. 152; *Christophers v. White*, 10 Beav. 523; *Moore v. Frowd*, 1 Jur. 653; *Ontario v. Winnaker*, 13 Grant's Ch. 443; *Meighen v. Bell*, 24 Grant's Ch. 503; *Broughton v. Broughton*, 5 De G. M. & G. 160; *Morgan v. Hannas*, 49 N. Y. 667; but see *Stanes v. Parker*, 9 Beav. 388, and cases in note; *Harris v. Martin*, 9 Ala. 895; *Morgan v. Nelson*, 43 Ala. 586; *Mumma's Account*, 5 Pa. L. J. Rep. 424; *Scott v. State*, 2 Md. 284; *Clack v. Carton*, 7 Jur. (N. S.) 441; *Hanson v. Baillie*, 2 Macq. 80; *Teague v. Corbitt*, 57 Ala. 529; *Welge's Case*, 1 Fed. Rep. 216.

The rule does not apply when such costs are not payable out of the trust funds. *Col. Co. v. Cameron*, 24 Grant's Ch. 548.

The mayor of a city has been held competent to act as its attorney. *Niles v. Muzzy*, 33 Mich. 61. See *Gibson v. Zanesville*, 31 Ohio St. 184; *Powers v. Decatur*, 54 Ala. 214; but in *Vin. Abr. Attorney (k)*, it is said that in an action

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between them, places the charge in the clerk's column instead of the solicitor's. The charge of \$1.85 is, if the bill in fact contains three folios, correct. The objection to the charge for entering appearance is that fifty-two cents are allowed for it, whereas but twenty cents should have been allowed. Here, again, the clerk has done the solicitor's work and charges him the fees to which the latter is entitled for doing it. The solicitor's fees for drawing the appearance are according to immemorial practice, there being no special provision for this work in the fee bill, as there is not for his compensation for drawing a bill of costs, is twenty cents. The clerk was, as the law stood when the appearance was entered, entitled to twelve cents for filing, and to twenty cents for entering the appearance. There is no error in this item.

by the commonalty of a town, one of the commonalty cannot appear as attorney for the commonalty, for he is party to the action; a statute prohibiting a director of a bank to appear as its attorney was deemed constitutional (*West Feliciana R. R. v. Johnson*, 5 How. (Miss.) 273); so brokers who were also attorneys were held not entitled to charge counsel fees for services about the business of their employer in relation to lands in their hands as such brokers (*Walker v. American Nat. Bk.*, 49 N. Y. 659; *Dyer v. Sutherland*, 75 Ill. 583); nor can a receiver act as his own counsel so as to charge the estate for his services (*Bank of Niagara Case*, 6 Paige 213; *McGourky v. Downs*, MS. N. J. Chan. May Term, 1880; see *Adams v. Woods*, 8 Cal. 321); nor can one member of a partnership who is an attorney, charge the others for professional services about the firm's affairs, either before or after dissolution (*Milburn v. Codd*, 7 B. & C. 419; *Van Duzer v. McMillan*, 37 Ga. 299; *McCrary v. Ruddick*, 33 Iowa 521); nor can an attorney who is a mortgagee recover his costs on his own foreclosure (*Sclater v. Cottam*, 3 Jur. (N. S.) 630; *Patterson v. Donner*, 48 Cal. 369); nor can a solicitor who has an interest in attending to a cause, charge for his services without an express agreement (*Martin v. Campbell*, 11 Rich. Eq. 205; see *Deere v. Robinson*, 7 Hare 283); but he would be liable for costs (*Voorhees v. McCartney*, 51 N. Y. 387; *Cone v. Donaldson*, 47 Pa. St. 363); a director of a corporation who brought suit as an attorney against such corporation, was held entitled to costs (*Christie v. Sawyer*, 44 N. H. 298); as to a stockholder sustaining such relation, see (*Spence v. Whitaker*, 3 Port. 297).

An attorney can recover ordinary witness fees when he offers himself as a witness in his own case (*Leaver v. Whalley*, 2 Dowl. 80; *Tanks v. Schmidt*, 25 How. Pr. 340); or is called in another's case during his regular attendance at that term (*Parks v. Brewer*, 14 Pick. 192; *Marshall v. Parsons*, 4 Jur. 1017; *Abbott v. Johnson*, 47 Wis. 239); but fees when so in attendance were refused in *McWilliams v. Hopkins*, 1 Whart. 276; *Crummer v. Huff*, 1 Wend. 25; *Jones v. Botsford*, 1 Pug. & Ew. 581; see *Reynolds v. Walker*, 7 Hill 144).

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These charges by the clerk for solicitor's work at solicitor's rates, have the sanction of very long-continued practice through the administration of various clerks, and the propriety thereof seems not to have been called in question. They are just. If made in the solicitor's column of the bill of costs there would be no ground for challenging them, for the solicitor is entitled to make them. From time immemorial the practice has been, for convenience, to charge them in the clerk's column. It of course makes no difference to the suitor who is required to pay them, whether they are charged in the one or the other. If the clerk does such work for the solicitor at his request, the fee allowed to the latter by the fee bill would be the reasonable compensation for it.

Where the cause was conducted by one member of a firm of attorneys, the fees of another member called as a witness were allowed (*Butler v. Hobson*, 5 Bing. N. C. 128, 1 Arn. 424).

Query, whether an attorney who calls himself as a witness can now recover his fees, since other parties calling themselves cannot (*Grinnel v. Dennison*, 12 Wis. 402; *Hale v. Merrill*, 27 Vt. 738; *Nichols v. Brunswick*, 3 Cliff. 88; *Parker v. Martin*, 3 Pittsb. 166; *Grub v. Simpson*, 6 Heisk. 92; *Delcomyn v. Chamberlin*, 48 How. Pr. 409; *Stratton v. Upton*, 36 N. H. 581; see *Howes v. Barber*, 18 Q. B. 588).

It seems a co-defendant who attended solely as a witness may recover (*Barry v. McGrade*, 14 Minn. 286); so if the plaintiff call the defendant (*Harvey v. Tebbutt*, 1 J. & W. 197; *Goodwin v. Smith*, 68 Ind. 301; *Leeds v. Amherst*, 14 Sim. 357; *Young v. English*, 7 Bear. 10; see *Hutchins v. Hutchins*, Ir. L. R. (10 Eq.) 453). If an attorney refuse obedience to a subpoena he can be punished for contempt as a witness only, and cannot be deprived of his office as attorney (*Com. v. Newman*, 2 Phila. 262).

If an attorney bears any other relation to the subject matter of the suit (c. g.) as an agent, auctioneer, &c., the court will not exercise summary jurisdiction over him (*Cocks v. Harman*, 6 East 404; *Grubb's Case*, 5 Taunt. 206; *Edwards v. Hodding*, Id. 815; *Toms & Moore's Case*, 3 Ch. Cham. 41; see *Dickson v. Wilkinson*, 4 De G. & J. 508; *Carroll's Case*, 2 Ch. Cham. 323; *Allen v. Aldridge*, 5 Bear. 401; *Rawes v. Rawes*, 7 Sim. 624; *Weeks on Attys.* §§ 77, 94; *Smith v. McLendon*, 59 Ga. 523; *Pennock v. Fuller*, 41 Mich. 153; 17 Am. Law Reg. (N. S.) 759 and note).

An attorney who is a party to a suit is entitled to recover his costs (*Gugy v. Brown*, L. R. (1 P. C.) 411, reversing S. C. 11 Low. Can. 409; *Jervis v. Daves*, 4 Dowl. P. C. 764).

He can recover nothing for loss of time (*Pritchard v. Walker*, 3 C. & P. 212;

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The construction of the fee-bill which has been followed in the taxation of costs for filing the answer and its accompanying affidavits, &c., has existed for very many years and under different clerks in chancery, and though the attention of the legislature appears to have been drawn to it in the passage of the act of 1879 (*P. L. of 1879 p. 103*), yet it left the construction undisturbed except in the respects specified, and it so, by implication, recognized it. By that act it is provided that if upon any paper filed there be "endorsed any return, affidavit of service or of non-residence or statements of sheriffs on executions, or masters' fees, or other matter," but one fee for filing such paper with such matter endorsed thereon shall be allowed. It will be seen that the prohibition (for such, in view of the existence of the practice under consideration, it in effect is) is directed merely to certain endorsements, and it does not extend by its terms (nor by implication) to affidavits of verification and schedules attached to a bill or answer. It has reference to returns and matters of a like character, without regard to the mode in which they are made, whether it be by statement or affidavit.

All the charges excepted to are allowable, except the retaining fee in Mr. Mount's bill. It does not appear that he employed counsel, and therefore a retaining fee will not be allowed. As to the alleged excess in the charges and allowances for the number of folios in papers, those errors, if they exist, are of course to be corrected. No costs of this motion will be awarded to either party.

Collins v. Godefroy, 1 B. & Ad. 950; see *Corley v. Moore*, *Glassc.* 336; *Severn v. Olive*, 3 *Irish Law Rec.* 193).

He is not obliged to pay for a plea where he himself is plaintiff (*Anon. Sayer* 77).

The institution of county courts does not destroy an attorney's privilege as to suing and being sued in his own court, and subject him to costs for not recovering more than the amount recoverable in the inferior court (*Lewis v. Hance*, 5 D. & L. 641, 11 Q. B. 921; *Jeffreys v. Beart*, *Id.* 646; *Jones v. Brown*, 2 *Exch.* 329; *Johnson v. Bray*, 2 B. & B. 698; *Borradaile v. Nelson*, 14 C. B. 655; but see *Bailey's Case*, 1 *Johns. Cas.* 32; *Varian v. Ogilvie*, 3 *Johns.* 450; *Boulton v. Hubbard*, 6 *Johns.* 332; *Walsh v. Sackrider*, 7 *Johns.* 537; *Foster v. Garnsey*, 13 *Johns.* 465; *Wood v. Gibson*, 1 *Cow.* 597; *Draper v. Beasley*, 8 U. C. Q. B. 260).—REP.

Dickinson v. City of Trenton.

SAMUEL M. DICKINSON

v.

THE INHABITANTS OF THE CITY OF TRENTON.

1. Where, on a bill to remove cloud from title, arising from a municipal assessment and sale thereunder, it was averred merely that the city was made a party to a suit for foreclosure of a mortgage on the premises, and a decree obtained therein, and the premises sold—*Held*, on demurrer, that such decree and proceedings do not bar the city from selling such premises under a valid assessment, where it is not alleged that such mortgage was prior to the assessment, or that the assessment was attacked or called in question in the foreclosure suit, or the city called on to redeem because the assessment may have been paramount to the mortgage.

2. A sale under a decree obtained in this court cannot be attacked collaterally by setting up that the solicitor who acknowledged service of the subpoena on the party affected by it in the suit in which the decree was made had no authority to do so, nor that the ticket accompanying the subpoena did not apprise such party of the ground on which he was made defendant to the suit.

Bill to remove cloud from title. On demurrer and plea.*Mr. W. L. Dayton*, for defendants.*Mr. S. M. Dickinson*, in pro. pers.

THE CHANCELLOR.

The bill is filed to remove a cloud from title. Its object is to obtain a decree declaring null a certain assessment made by the city of Trenton, under its charter, upon the complainant's land there, for a municipal improvement, and a sale made thereunder to the city. The bill alleges that the assessment and sale were illegal and invalid, and also that in 1876 a mortgage upon the property was foreclosed in this court, in a suit to which the city was a party defendant, and that by the decree in that suit the city was foreclosed of all title to the premises under the assessment. The defendants have both demurred and pleaded. By the plea they plead that the validity of the assessment has been

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fully and conclusively established at law, and they plead also that they were not served with process of subpoena in the foreclosure suit, and that though service of subpoena, therein on them was acknowledged by a solicitor of this court, as "city solicitor" of Trenton, he had no authority to acknowledge such service; and further, that the ticket accompanying the subpoena did not mention the assessment, but only an inconsiderable tax which had been assessed upon the property. It is admitted by the complainant that the plea is good so far as the validity of the assessment and sale is concerned, irrespective of the bar of the decree in the foreclosure suit, and that the bill cannot be maintained except on the ground of that bar. To consider the claim of bar as made by the bill:

It does not appear by the bill that the defendants were made parties to the foreclosure suit with respect to the assessment in question. It does not appear that it was alleged in the bill that the mortgage was prior in date to the assessment, or that the assessment was attacked or called in question in any way whatever in the suit, but merely that the city was a defendant, and, by the terms of the decree, was foreclosed of all estate, right, title and interest in the mortgaged premises, when sold under the decree, and that the complainant in this suit was the purchaser of the property at the sheriff's sale under the decree. The averments of the bill in this respect are not sufficient to constitute any bar to the claim of the city under the assessment. Though the city was a defendant to the suit, yet if it was not called upon therein to answer as to the validity or lien of the assessment, or the validity of the sale under it, it is not barred by the decree. The object of the foreclosure suit was to foreclose the equity of redemption of the defendants in the property. But if the city had a title or claim paramount to the mortgage, it obviously was not embraced even in the terms of the barring clause of the decree; for it had no equity of redemption with respect to such claim, so far as the mortgage of the complainant in that suit was concerned, but as to such prior claim it was the complainant in the suit who had an equity to redeem it. Where a widow was made a party defendant to a bill for foreclosure, on other grounds than her

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claim to dower in the mortgaged premises, it was held that her right to dower was not affected by the decree. *Wade v. Miller*, 3 Vr. 296. See, also, *Wilkins v. Kirkbride*, 12 C. E. Gr. 93; and *Lewis v. Smith*, 9 N. Y. 502. And where, in a suit at law, a decree in a suit in equity was relied upon as a defence, and it appeared, by comparison of the decree with the issue in the suit in which it was made, that that part of it on which the defendant's defence in the suit at law depended was outside of the issue, it was held that the decree was a nullity as to that part, although the plaintiff was a party to the suit. *Munday v. Vail*, 5 Vr. 418. To illustrate further: If, in a foreclosure suit brought on a second mortgage, the holder of a prior encumbrance is made a party, not with respect to that encumbrance, but of some other one subsequent to that of the complainant, and the prior encumbrance is not assailed or mentioned in the bill, it is obvious that he would not be barred of his claim under his prior encumbrance by the words of foreclosure and bar in the decree. Inasmuch as it does not appear, by the averments of the bill in this case, that the assessment or the sale under it was in anywise called in question in the foreclosure suit, or the city therein called on to redeem with respect to its claim under them, it does not appear that the decree is a bar. The averments of the bill on this head are therefore insufficient.

Nor would the plea have been good if the averments of the bill had been sufficient. If the solicitor by whom the service of subpoena was acknowledged was not authorized to do so, and if the ticket accompanying the subpoena did not mention the assessment or sale thereunder, the fact cannot avail the defendants as a bar to the claim of the complainant under the sheriff's deed. The decree is his protection against all irregularities in the proceedings up to the decree. The rule is laid down by the court of errors and appeals that the decision of a domestic court of general jurisdiction, acting within the scope of its powers, has inherent in it such conclusive force that it cannot be challenged collaterally, and it definitively binds all parties embraced in it,

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unless on objection made to such court itself, or in a direct course of appellate procedure. *McCahill v. Equitable Life Assurance Soc.*, 11 C. E. Gr. 531.

EDITH HANKINSON

v.

SAMUEL E. HANKINSON.

The separation of a husband and wife, acquiesced in by the wife, and which she did much to bring about, however long continued, does not constitute desertion to authorize a divorce on her petition. Such a separation, however, would become desertion from the time the complaining party makes sincere overtures to terminate it.

Petition for divorce. On pleadings and proofs.

Mr. I. R. Wilson, for petitioner.

Mr. E. W. Evans, for defendant.

THE CHANCELLOR.

The petitioner prays a divorce from her husband, on the ground of desertion. By the petition she alleges that he deserted her in October, 1874. He, though he does not, by his answer, expressly deny the charge, does so substantially, setting forth the circumstances of the separation, which he attributes wholly to his wife, and alleging that as long ago as 1873 she determined that she would not live with him, and has adhered to such determination. He avers that he has been willing at all times since then to support her and his children, as far as his wages would go, and that he has clothed one of the children, but that his wife has resolved not to live with him. The parties were married in 1866, and they have ever since resided in Trenton. Their separation began in October, 1873, up to which time they had lived together as husband and wife. In that

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month the petitioner's mother died, and very soon after the funeral the petitioner left her husband to go to Maryland, on a visit to her sister, who lived there. She appears to have been absent (returning in the meantime to Trenton for a day) for several weeks. During her absence, the defendant lived at his father's house, which was near the house in which the parties resided when the separation began. The petitioner returned to the latter house (which belonged to her mother's estate), when she came from Maryland, and ever since then the separation has continued. The relations between them prior to her mother's death were not pleasant. Her mother lived in their family, and for six months before her mother's death the petitioner refused to speak to her husband. The reason seems to have been his refusal to speak to her mother, between whom and him there were unpleasant feelings, arising out of his objection to the frequent visits and continued stay of her sister and her child to the house. On the day her mother died, he offered his wife his condolence, and proffered his services in regard to the funeral arrangements, but she declined them, saying that he had done nothing for her mother when she was living, and that she did not want him to do anything for her then. For six months before that time he had taken all his meals at his father's house, and his mother did most of the mending of his clothing. According to all the testimony, he never treated his wife unkindly. He testifies that on the morning after the funeral (he thinks it was the 8th of October, 1873), his wife came into his room when he was dressing to go to his work (he is a carpenter), and asked him if he thought as much of the children as she did; to which he replied that he did not know how much she thought of them, but he thought a good deal of them; that she then said that she had a proposition to make to him, and it was this: that if he would give her six dollars a week, as he had theretofore, he could come to the house and sleep, as he had been doing, but should take his meals at his father's; for as to living with him as his wife, she had promised her mother that after the latter was dead and buried she would never do it. He says she added that she asked no odds of him, that she had plenty of money to

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keep herself, and if he would not do as she proposed, he should not be there with the children. He further says that she then told him that she was going away from Trenton, and did not know how long she would be gone—that she was going home with her sister. Two or three days after that she left for Maryland, and was gone, he says, until sometime in the latter part of the following month. He asked her if she would not write to him while she was away, and let him know how the children were, and she said she would not. She denies that she told him what he swears she did in the conversation above stated, said to have taken place on the 8th of October. There is some corroboration, however, of his testimony in that of the witness Albertson. She is not corroborated in any way; and I see no reason for refusing to the defendant's testimony, if uncorroborated, at least as much confidence as to hers, equally unsupported. He says that when she went away, he did not know that she was going to leave on that day, and that she caused his trunk, containing his underclothing, to be set out on the back piazza of the house in which they lived, and such of his outside clothing as he kept in his room, to be placed on top of it, wrapped in paper, and locked up the house and went away in his absence. She and some of her witnesses say that he himself caused the trunk and underclothing to be placed there, in view of her intended departure. She did not write to him while she was absent, nor did she send him any message. She returned for a day (to get some money to pay her board in Maryland, she says), but did not go to see him, nor inform him, or attempt to inform him, in any way, of her presence in Trenton. When she returned to Trenton to stay, she sent him word, she says, that she and the children had returned. He denies that he received any notification whatever. From that time to this they have lived near each other—she in the house in which they had previously lived, and he at his father's, near by. Their two children have lived with her. They have visited him, and he has bought clothes for the boy, but never has been requested to do anything for the girl. He and his wife have never spoken to each other but once in all that time. She has never asked for any money, or any assistance of any kind, from

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him, but has lived on her income received from her property and her profits in keeping boarders. She has said (but not to him), within a few months before this suit was brought, that she was willing to live with him if he would return to her, and there is evidence that he has said, within the same time, that he would not live with her again. It is also proved that he has also said he was willing to assist her in any way, if she wanted his assistance. She says that the reason why he would not live with her was because of her unwillingness to give him control of her property; but there is no evidence of it.

A full and careful consideration of the evidence leads me to the conclusion that the separation between these parties was not sought by the defendant, and that it has not been without the consent or against the will of the petitioner. She has never even intimated to his father or mother, with both of whom she has been on friendly terms, any desire that he should live with her. His mother says that the petitioner has never mentioned his name to her since the separation. She has never spoken to, or communicated with, her husband but once since the separation, and that was shortly after her return from Maryland, and then the conversation was about his paying for a pair of shoes which she says he ordered for the girl when she went to Maryland, and refused to pay for, but which he denies that he ordered. When they have met in the street they have not spoken to each other. He says she would turn her head away from him when they met. There has, indeed, been a cessation of cohabitation, but that it has been with her hearty acquiescence is evident from their relations to each other before it began and her conduct towards him since it has continued. When inquired of on the witness-stand as to whether she had made any overtures to her husband, she answered that she had not, and gave as her reason that it was as much his duty to seek her as it was hers to seek him. The testimony is, on many points, conflicting and positively contradictory, and some of the witnesses are not such as to inspire confidence. The testimony of the petitioner herself is by no means free from criticism. She evidently testifies under a strong bias. Enough appears from the

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testimony as a whole, however, to warrant the conclusion that the separation complained of was, to say the least of it, not against her will, and that she, at least, cheerfully acquiesced in it.

Where, from mutual dislike, incompatibility of temper, uncongeniality or other cause, husband and wife voluntarily separate, such separation, however long continued, will not of itself constitute desertion on either side, within the meaning of the statute. It will become a desertion, however, from the time when a renewal of marital cohabitation is sincerely sought, or, in other words, from the period when the mutual acquiescence in the separation is put at an end by the overtures of the complaining party. ¶ Had the petitioner, at any time during the separation, communicated to her husband her wish that he would, or willingness that he should, live with her as her husband, and he had refused, from that time he would have been chargeable with desertion.) But there is no evidence on which any reliance can be placed, of any such desire or willingness on her part. She says that when she returned from Maryland she sent the children to his father's house, to inform him that "they had got home." One of the children—the girl—was then about five years old, and the other—the boy—only between two and three. The girl testifies, indeed (when she was sworn she was between eleven and twelve years old), that she told him that "they had got home, and asked him if he was not going to live with them again," and that he replied, "No; but it is all right." The petitioner, however, does not say that she told her to ask the question; and if the relations between her and her husband were not unpleasant when she went away (and she went, she says, to Maryland with his consent, and merely on a visit), it does not appear why she should have asked such a question, involving, as it did, the suggestion that he had abandoned her—which, according to her testimony, she had no reason whatever to suspect. It does not appear that he had separated himself from her at all then, except in accordance with her desire and for her accommodation, to enable her to visit her sister. On the other hand, the defendant swears that he did not receive any message whatever from her by the children, but that he first saw them in the street, and

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they avoided him, and he was compelled to employ the kind offices of a friend to induce them to come to him. Again, as before stated, the daughter, at the time of the alleged message, was but five years old. For that reason, if for no other, her testimony on the subject cannot outweigh the sworn denial of the defendant. The petitioner has never, according to her own testimony, sent a kind or conciliatory message to her husband, but has treated him with unconcern, if not with evidences of positive dislike. Her attitude has been that of acquiescence, at least, in a separation which she appears to have done much to bring about, and which does not appear to have been at any time against her will. She has never complained that he did not live with her. She would, apparently, have been entirely satisfied if he had supported her and the children, even though he lived separate from her. She does not appear to have desired his society, but the contrary. Both parties are in the wrong. It is not profitable to inquire on which side the preponderance is. For the sake of their children, they ought not to have been satisfied to live separate from each other, but should have endeavored to effect a reconciliation. They have not done so. The separation which has existed is not, on either side, desertion, within the meaning of the statute. It has been frequently held that the separation which constitutes desertion must have been against the will of the complainant. *Moore v. Moore*, 1 C. E. Gr. 275; *Bowlby v. Bowlby*, 10 C. E. Gr. 406; *S. C. on appeal*, *Id.* 570; *Belton v. Belton*, 11 C. E. Gr. 449; *Taylor v. Taylor*, 1 Stew. Eq. 207.

The petition will be dismissed.

Davis v. Howell.

WILLIAM M. DAVIS, assignee, &c.,

v.

JOSEPH HOWELL, assignee, &c.

On marshaling the assets of both partnership and individual estates, under separate assignments for the benefit of creditors, the partnership creditors are not entitled, after exhausting the partnership assets, to resort to the individual assets until after the individual creditors' claims have been satisfied.

Bill for relief. On final hearing on bill and answer.

Mr. J. F. Dumont, for complainant.

Mr. G. M. Shipman and *Mr. J. G. Shipman* for answering defendants.

THE CHANCELLOR.

John C. Bennett and James M. Andrews were, on or about the 10th of February, 1876, partners in business in Phillipsburg. On that day they made an assignment under the assignment act, for the equal benefit of their creditors, to the complainant, William M. Davis. Five days after the making of that assignment Andrews made an assignment, under the act for the equal benefit of his creditors, to the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about eleven per cent. of the partnership debts. Most of the partnership creditors have put in their claims under the assignment of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten the complainant and his co-assignee of Andrews's estate with legal proceedings if their demand be not complied with. The complainant therefore

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comes into this court for protection and instructions as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews's estate, and he is made a defendant.

The question presented has been often discussed, and, though there exists some contrariety of judicial determination upon it, must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate. *Story's Eq. Jur.* § 675; *Snell's Prin. of Eq.* 419; *Story on Part.* § 376; *Kent's Com.* 64, 65; *Parsons on Part.* 480. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder*, 2 Vern. 706; it was affirmed by Lord Hardwicke, and though Lord Thurlow refused to follow it, it was restored by Lord Loughborough and followed by Lord Eldon, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this state. *Cammack v. Johnson*, 1 Gr. Ch. 163; *Matlack v. James*, 2 Beas. 126; *Mitnacht v. Smith*, 2 C. E. Gr. 259; *Scull v. Alter*, 1 Harr. 147; *Curtis v. Hollingshead*, 2 Gr. 402; *Brown v. Bissett*, 1 Zab. 46; *Linford v. Linford*, 4 Dutch. 113. In *Scull v. Alter* the supreme court recognized the rule in all its parts. Chief Justice Hornblower, by whom the opinion of the court was delivered (the question arose under an assignment under the assignment act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their

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respective and several estates, then it must be treated as such. The estates and debts must be marshaled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated. *Camp v. Grant*, 21 Conn. 41. It has been repudiated also in certain other states. *Bardwell v. Perry*, 19 Vt. 292; *Emanuel v. Bird*, 19 Ala. 596. But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration. In *Wilder v. Keeler*, 3 Paige 167, Chancellor Walworth, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under consideration there was, at the death of G. F. Lush, a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree, have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors, upon the principle of this court that equality is equity." The doctrine was recognized in *Morgan v. Skidmore*, 55 Barb. 263. In Pennsylvania in *Bell v. Newman*, 5 S. & R. 78, 91, 92, Gibson (afterwards chief-justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal*, 44 Pa. St. 503, and again in *McCormack's Appeal*, 55 Pa. St. 252, the doctrine is completely recognized and affirmed. In South Carolina, in *Woddrop v. Price*, 3 Desauss. 203; *Tunno v.*

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Trezevant, 2 *Desauss.* 264, and *Hall v. Hall*, 2 *McCord's Ch.* 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill v. Neill*, 8 *How.* 414, it is recognized by the supreme court of the United States.

The objection that is always pressed as the conclusive argument against it is, that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt, which the partnership assets may not be sufficient to satisfy, with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate he will not be deprived of it. *Wisham v. Lippincott*, 1 *Stock.* 353; *Randolph v. Daly*, 1 *C. E. Gr.* 313; *National Bank v. Sprague*, 5 *C. E. Gr.* 13; *Howell v. Teel*, 2 *Stew. Eq.* 490. But if he has no such lien, and the assets are to be marshaled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner and for like reason, give the latter preference upon the separate property. Such was the view of Chancellor Kent. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner." 3 *Kent's Com.* 64, 65. The obvious infirmity of the objection

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to the rule is, that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt, while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there is in the case of all such rules, instances in which it works unsatisfactorily, yet that on the whole, and as a rule, it has not operated unjustly, is evidenced by the fact that it has existed so long (*Ex parte Crowder* was decided in 1715), notwithstanding opposition, and that in Massachusetts, at least, it has, in the face of the opposition referred to, been established by legislative authority, and that, too, as lately as 1838. In this state it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in *Wisham v. Lippincott*, 1 Stock. 353, 356, the chancellor expressed strong doubt of its correctness, as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognized without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant—the partnership estate—and Andrews's estate in equal shares.

Adams v. Beideman.

ISRAEL B. ADAMS

v.

MARIA BEIDEMAN et al.

A testator gave his homestead farm to three of his children equally, and further gave legacies to his widow in lieu of her dower, "secured on good freehold security, and the interest thereof paid half-yearly to her;" and also the interest on a legacy to a daughter for life. He then, after the payment or securing of the above-named legacies, gave all the residue of his estate, including the remainders of the legacies, to the three first-named children. One of them and a person not of the family were the executors. They had never filed any account. On a bill for a partition of the farm by such executor—*Held*,

(1) That the legacies were charged on the whole farm, and the amount due thereon ought to be ascertained before a sale was ordered on partition.

(2) That the complainant, who, by purchase from his brother, since testator's death, had acquired another third of the farm, and had occupied it since then, could not be called to account by the defendant, for the one-third of the proceeds of the farm during his occupancy, without a cross-bill.

(3) That since the amount of the personal estate, and the extent of the deficiency thereof to satisfy the debts and legacies, did not appear, a sale would not be ordered until after the executors have settled their account in the orphans court.

Bill for partition. On final hearing on pleadings and proofs.

Mr. C. A. Bergen, for complainant.

Mr. T. J. Middleton and *Mr. T. B. Harned*, for the answering defendant, Maria Beideman.

THE CHANCELLOR.

The bill prays a partition of a farm in Camden county, of which Isaac Adams, father of the complainant, died seized in 1877, and which, by his will, he gave to his three children, Israel B. Adams, Maria Beideman and George W. Adams. The complainant, having bought George's share, is the owner of two-thirds of the property, and Maria of the other third. By his will, Isaac Adams, after directing that his debts be paid by his

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executors, gave to his widow two promissory notes which he held and the sum of \$500 in cash, and then ordered that the sum of \$1,500 of his estate be secured on good freehold security and the interest thereof paid half-yearly to her; which bequests he declared were in lieu of dower. He next gave his daughter, Rebecca Ann Garwood, the interest of \$500 for life, and then made the following disposition of the residue of his estate, subsequently, however, excepting therefrom certain articles of personal property which he gave to his widow:

“After the debts and expenses and the above-named legacies be paid or secured to the interest of the above-named legatees, I give and bequeath all the residue and remainder of my estate, real, personal or mixed, including the \$500 after the death of my daughter Rebecca Ann, and also the \$1,500 secured to my wife, Jane Ann, after her death or ceasing to remain my widow, to my three children, Maria Beideman, Israel B. Adams and George W. Adams, share and share alike, equal between the three.”

There can be no question that the legacies to the widow and Rebecca Ann are charged upon the real estate. *Corwine v. Corwine*, 9 C. E. Gr. 579. The farm is not divisible among the owners without great prejudice to the interest of Mrs. Beideman at least. Moreover, it is, as a whole, subject to the lien of the legacies.

Mrs. Beideman insists that the complainant is bound to account to her in this suit for one-third of the value of the use and occupation of the farm from the time of the testator's death. She has lived in part of the house on the property ever since that time, and he has occupied the rest of it, and has, as she insists, tilled the farm, assuming control over it and excluding her therefrom, and has taken the profits thereof to his own use. But in the condition of the pleadings the complainant cannot be called to account in this suit. There is no cross-bill, and it may be remarked that the answer does not even refer to the matter. It merely “admits” that, at the decease of the testator, the complainant was in the occupation of the farm (except the part of the house occupied by Mrs. Beideman) under a lease from the testator, and that he still is in possession; and it “charges” that he is in great arrears for rent for the use and occupation of the

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farm. But if the claim had been set up by the answer it could not be considered. A cross-bill was necessary.

By the bill it is alleged that the personal estate of the testator amounts to but little more than enough to pay the debts, and is entirely inadequate to pay the legacies. The answer denies the truth of this statement, and charges the complainant (he and Joel Horner were the executors of the will) with neglect in the performance of his duty as executor in not appraising, collecting and accounting for all of the personal property, and insists that if the estate were properly settled, sufficient money could be realized to pay the debts and part of the legacies. It also claims that the complainant is himself a debtor of the estate, and it insists that the amount of the deficiency in payment of the legacies, after applying thereto the personal estate applicable, should be ascertained before a sale of the property should be ordered. The legacies are a charge on the whole property, and the amount of the lien should be ascertained before the sale; for the property would be sold subject to it. Mrs. Beideman insists that the complainant and his co-executor should be called to an account here for their delinquency in the settlement of the estate, and that the amount applicable to the payment of the legacies should be ascertained in this suit. But the pleadings are not apt for that purpose. They have not been called into court to settle the estate. The complainant's bill prays for partition merely, and Horner is a defendant thereto only as being interested in the raising and investing of the legacies out of the land. If Mrs. Beideman desired to call them to account for the estate in this suit, she was bound to do so by cross-bill. It appears, however, that they have never filed their final account, and they do not appear to have settled the estate. Obviously, Mrs. Beideman has a right to have it ascertained what amount of the personal estate is applicable to the legacies before a sale of the land, and the complainant is not entitled to have a sale of the land in partition until the amount of the lien shall have been definitely fixed. The decree for sale will be withheld until the executors shall have settled their account of the estate in the orphans court of Camden county.

Courter v. Howell.

JULIA COURTER

v.

FRANCIS K. HOWELL et al., executors.

A parent gave testamentary power to her executors to sell a certain house and lot, and to set apart \$3,000 of the amount derived therefrom for the sole and separate use of her daughter Julia [the wife of C.], who was to receive the interest and income thereof during her natural life, and at her death it was to be paid to the persons who at that time might be her heirs at law; and further provided that, if Julia should so elect, the fund might be invested in a house and lot, which she might select, and which should be conveyed to her; with a further declaration that Julia should enjoy the same free from the control of her husband.

Testatrix's house and lot have been sold. Julia's husband is dead, and on bill to compel the executors to pay over to her absolutely the \$3,000—*Held*, that since Julia could require the executors to purchase a house and convey it to her, for her sole and absolute use and disposition, she is entitled to have the \$3,000 paid to her directly and absolutely.

Bill for relief. On bill and answer.

Messrs. Guild & Lum, for complainant.

Mr. F. K. Howell, for defendants.

THE CHANCELLOR.

Julia Ann Sommer, deceased, late of Newark, by her will, dated April 6th, 1872, gave power to her executors to sell her house and lot in Mulberry street, in that city, and provided that when it should have been sold, \$3,000 of the proceeds of the sale should be set apart for the sole and separate use of her daughter Julia (then the wife of George W. Courter, now deceased), who was to receive the interest and income thereof during her natural life, and at her death it was to be paid to the persons who at that time might be Julia's heirs at law. And she further provided that if Julia should so elect, the fund might be invested in a house and lot, which she might select, in which case the conveyance of the

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house and lot should be made to her. And the testatrix declared that it was her intention that Julia should enjoy the same free from the control of her husband. The testatrix's house and lot in Mulberry street have been sold, and the \$3,000 given to Julia are now in the hands of the executors. By her bill in this suit she prays that the fund may be paid over to her. As above indicated, she is now a widow. It is obvious that she has the right to require that the money shall be invested in a house and lot, and that the conveyance be made to her to her own use. It is equally obvious that in such case she could forthwith sell and convey the property, and take to her own use, absolutely, the proceeds of the sale. When the interest or income of a fund is given to one for life with a limitation over, and the gift is accompanied with a power to the donee of absolute disposition of the fund during life, the donee will be held to be entitled to the fund absolutely, for he is the equitable owner of it absolutely. In *Barford v. Street*, 16 Ves. 135, where there was a devise of real and personal estate, in trust, to pay the rents, dividends &c., to the separate use of a married woman for life, and after her decease to convey as she should, by deed or will, limit or appoint, with a limitation over in case of her death in the lifetime of the testatrix, or in default of such direction, limitation or appointment, it was held, notwithstanding the codicil to the will indicated an intention that the estate should remain in the hands of the trustee for the devisee's life, with powers inconsistent to a great degree with the supposition of her having or being able to acquire the absolute interest, that the gift was absolute, on the ground that the devisee had, by the will, full and unlimited power to dispose of the estate in her lifetime, by deed or will, and that therefore the whole equitable fee was subject to her disposition. In *Irwin v. Farrer*, 19 Ves. 86, a legacy was given to a trustee on special trust to invest it in government securities, and pay the dividends from time to time to the testatrix's niece, and after her death to pay the principal to such person as she should, by will or otherwise, appoint; but if she should be desirous at any time to purchase an annuity for her life with the legacy, she should be at liberty to do so, provided the annuity should be purchased

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with the approbation of the trustees; and it was also provided that she should not have power to sell the annuity. It was held that she had absolute power of disposition over the whole fund, and that the demand by bill was a sufficient indication of her intention to take the whole for her own benefit, and the execution of a formal appointment was unnecessary.

In the case under consideration, the testatrix undoubtedly intended to secure to the legatee the use of the fund as against her husband so long as it remained uninvested in real estate, but meant to give her the absolute control of it to invest it at her pleasure in real estate, to her own use absolutely. This is manifestly equivalent to a provision that she may at will take the fund into her own hands for her own use absolutely. She will not be compelled, in order to obtain the benefit of the provision, to convert the fund into real estate, and then to sell that (perhaps at a sacrifice), but the fund will be given to her directly. There will therefore be a decree that, after deducting the costs of this suit, which are to be paid thereout, it be paid over to her.

JAMES D. CUBBERLY et al.

v.

SAMUEL D. CUBBERLY.

A testatrix, after giving several legacies, gave the residue of her estate to her executor, to be by him distributed to such charitable or religious societies or associations or corporations, or for such other benevolent purposes, as he might see fit. Her next of kin were an uncle D. and two aunts, Mrs. G. and Mrs. R. Another aunt was dead, leaving children—Samuel, Alexander and the complainants—surviving. The probate of the will in New York, where testatrix lived, was opposed by D. and others. Pending the contest, Samuel falsely represented to Mrs. G. and Mrs. R. that D. had abandoned his opposition to the will, and promised that if they would make him their attorney to recover their interests in the estate, and would divide equally with him whatever he should recover for them as next of kin, he would attend to the litigation, pay all the costs and expenses himself, and divide the sum he received from

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them equally with his brothers and sister, the complainants, who, he stated, were poor and needy. Thereupon Mrs. G. and Mrs. R. gave him a power of attorney to act for them in the premises. D. continued his opposition to the will, and the contest was eventually compromised by admitting the will to probate, but declaring the residuary clause void. Mrs. R. and Mrs. G. gave one-half of what they received, as next of kin, to Samuel, who refused to divide it equally with complainants.—*Held*,

(1) That Samuel's promise to Mrs. R. and Mrs. G. to so divide with complainants was enforceable in equity, and that they were entitled to an account of his expenses about the litigation and to their several shares of the amount received by him under the agreement.

(2) That neither Mrs. R. nor Mrs. G. were necessary defendants or complainants, although they might have been proper complainants.

Bill for relief. On demurrer to bill.

Mr. A. Walling, jun., for demurrant.

Mr. E. L. Campbell, for complainant.

THE CHANCELLOR.

According to the bill, Mary B. Danser, of New York, made her will in December, 1876, whereby, after several devises and bequests, among which were legacies to a large number of her relatives, including Mrs. Mary Ann Golder and Mrs. Susan S. Robinson, she gave the residue of her estate to her executor, to be by him distributed to such charitable or religious societies or associations or corporations, or for such other benevolent purposes, as he might see fit. She died in February, 1877, leaving the will unrevoked, and leaving a large estate. She had no lineal descendants, and her next of kin were an uncle, Smith J. Danser, of Ohio, and two aunts, the above-mentioned Mrs. Golder, of New York city, and Mrs. Robinson, who was of New Bedford, Massachusetts. The next of kin were, at the time of her death, entitled to all that part of her personal estate which was not disposed of by the will. Samuel D. Cubberly, Alexander H. Cubberly and the complainants were the children of the testatrix's deceased aunt, Mrs. Lucy Cubberly, and therefore first cousins of the testatrix. They were the only children

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of Mrs. Cubberly who were living. The will was offered for probate, in New York, in February, 1877, and Danser and others opposed its admission to probate. While the proceedings were still pending, and in March of that year, the defendant falsely represented to Mrs. Golder and Mrs. Avery (Mrs. Robinson's daughter, and attorney as to all her interest in the estate), that Danser had given up all hopes of success in the contest, and had abandoned it and returned home to Ohio; and he proposed that they should give him a power of attorney, authorizing him to take such steps as he might see fit, to recover any interest of theirs in the estate besides what are called in the bill specific legacies, and to do everything necessary and proper to that end, and that they should give him one-half of the interest that might be recovered for them, he to pay all fees, costs and expenses of the measures which he might employ. They refused to accept the proposition at that time, and it was subsequently (in April following) renewed by him to them, on the like representation as to the design and conduct of Danser. He, on the latter occasion, represented to Mrs. Golder that his reason for demanding so large a share as one-half for his services was that his brothers (except Alexander H. Cubberly, to whom \$10,000 were given by the will) and sister were poor and needy, and his sister had suffered afflictions; that he did not want the money himself, since he had \$15,000 already, which was for him a competence; that he was acting in the interest of his poor brothers and sister, and that all that remained of any share that might come to him after payment of fees, costs and expenses, he would divide equally with them. That proposition, with those representations and the accompanying promise, were frequently repeated by him to Mrs. Golder and Mrs. Robinson (in person) and Mrs. Avery, up to the 25th of May following; and on that day he again had an interview with Mrs. Golder and Mrs. Avery, and again repeated the misrepresentation before mentioned, that Danser had abandoned the contest and gone back to Ohio. They objected to giving him so much as one-half, and Mrs. Golder suggested twenty-five per cent. and Mrs. Avery twenty. The defendant thereupon spoke of his poor brothers and sister, and his stipula-

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tion to divide equally with them any balance of any share which would be coming to him after the payment of fees, costs and expenses; and in consideration of that stipulation, and all the premises, they then acceded to his proposition. Mrs. Avery only agreed to the giving of so large a share as one-half to the defendant, after being specifically urged and requested by Mrs. Golder to do so, in order that the defendant's poor brothers and sister (who were not named in the will) might be benefited thereby. Mrs. Golder and Mrs. Robinson soon afterwards each gave him a letter of attorney, giving him full power, and authorizing him to act for them in recovering their interests other than what are called in the bill "specific legacies;" he to have one-half of what should be recovered, and they to be at no expense. In September, 1877, in pursuance of a compromise of the litigation over the will, a decree was made admitting it to probate, but declaring the residuary clause void. Of the residuum of the estate, Mrs. Golder and Mrs. Robinson recovered each about \$76,000, and each thereupon paid over one-half thereof to the defendant, in pursuance of the agreement, so that he received the amount of about \$76,000.

This suit is brought by the persons before referred to as the poor brothers and sister of the defendant, for an account of the share received by the defendant and the amount paid out by him, and of the balance thereof, which, as they insist, is divisible under the stipulation, and for the payment of their portions thereof to them. The defendant insists that the suit cannot be maintained, for want of equity; and that if it can be, Mrs. Golder and Mrs. Robinson are necessary parties to it. He urges that the complainants are seeking to obtain the benefit of what they insist was a fraud perpetrated by him on Mrs. Golder and Mrs. Robinson. But this objection is not valid. The bill is not filed to set aside the agreement. None of the parties to the agreement complain of it. The fraud alleged to have been practiced in obtaining the agreement is manifestly stated merely to show that the defendant's conduct in the whole matter—in obtaining the agreement as well as in refusing to pay the complainants—was insincere and fraudulent. The agreement, in

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itself, was a lawful one—one which could have been enforced at law as well as in equity. *Schomp v. Schenck*, 11 Vr. 125; *Dickey's Appeal*, 73 Pa. St. 218. The claim to relief depends on the simple question whether the stipulation that the defendant would divide equally with the complainants constituted part of the consideration of the agreement. If it did, then this suit can be maintained upon the stipulation. Besides, it is a fraud on his part, in such case, to refuse to pay the complainants. According to the bill, the agreement to give him so large a sum would not have been made but for the stipulation. Therefore, as to so much of the money as is the equal share of the complainants, he received it in consideration of the stipulation, and he is trustee thereof for them.

Nor are Mrs. Golder and Mrs. Robinson necessary parties to this suit. They have no interest in it adverse to the complainants. There could be no decree against them. They might have joined the complainants in the effort to enforce the trust they had created, but there was no necessity for their doing so. If one person make a promise to another, on lawful consideration, for the benefit of a third person, such third person may maintain an action, even at law, upon it. *Joslin v. Car Co.*, 7 Vr. 141. And if suit is brought in equity, the promisee is not a necessary party to it. *Pruden v. Williams*, 11 C. E. Gr. 210.

The demurrer will be overruled, with costs.

ANNA L. HITCHCOCK

v.

THE MIDLAND RAILROAD COMPANY OF NEW JERSEY et al.

By the direction of a committee selected to represent and protect the bondholders of a railroad corporation, in the sale of the property and re-organization of the company, a circular was issued requesting each bondholder willing to come in, to deposit his bond with a designated trust institution in New York, together with the amount of a specified assessment to defray the expenses of the proceedings, and to obtain therefor the receipt of such trust institution, countersigned by the representative of the committee to be thereafter desig-

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nated. The circular further stated where the office of the committee was in New York, and was signed by the members of the committee, including Howard P. Dechert, "secretary," and required such deposit to be made on or before December 31st, 1879. The complainant was the holder of a bond for \$1,000, which she took to the trust company for deposit, together with the amount of her assessment, on January 13th, 1879. The trust company refused to receive it, and referred her to the committee, whereupon she took it to the designated office of the committee, where Mr. Dechert received it and her assessment, giving her a receipt of the committee therefor. Three days afterwards, Mr. Dechert, as secretary, deposited with the trust company this bond and four others, taking therefor a certificate in his individual name. The sale was consummated, the company re-organized, and are about to issue new bonds in lieu of the old ones, but refuse to acknowledge the validity of complainant's receipt or her claim to either her old bond or a new one, on the ground that she did not deposit the bond with the trust company.—*Held*, that she is entitled to relief, and it is no objection that the present holder of complainant's bond is not made a party, because, for aught that appears, either the committee or its agent, the trust company, holds it; or if the secretary of the committee has misappropriated it, such act does not prejudice complainant; nor does it appear that any one having an interest has been omitted, nor that complainant failed in a strict compliance with the instructions of the committee's circular, as to deposit with the trust company, because the committee waived such requirements by accepting the bond and assessment.

Bill for relief. On general demurrer.

Mr. J. W. Taylor, for demurrants.

Mr. G. R. Brown and *Mr. C. J. G. Hall* (of New York), for complainant.

THE CHANCELLOR.

According to the bill, the property of the New Jersey Midland Railway Company was under foreclosure. Previous to or pending the proceedings, a plan of re-organization of the company, by or in the interest of such of the bondholders as should agree to it and contribute to the expense of carrying it out, was adopted, and, by circular, bondholders were invited to come in and participate in the benefits of the arrangement. A committee, called the "re-organization committee," was appointed. Among those who constituted it was Howard P. Dechert, and he was its sec-

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retary. By the circular before mentioned (a copy of which was received by the complainant), those who were interested in the matter were informed that all first mortgage bondholders, desirous of participating in the purchase of the road at the foreclosure sale, were to deposit their bonds with the Central Trust Company, in the city of New York, on or before the 31st of December then next, together with one-quarter of one per cent. on the amount of such bonds, in cash, for defraying the costs of foreclosure and expenses incident thereto, taking the receipt of that company therefor, countersigned by the representative of the permanent committee, to be thereafter appointed to perfect the organization in such form as they should determine; and that the holders of the second mortgage bonds, who should desire to avail themselves of the provisions of the plan, were to deposit their bonds and pay a like percentage thereon, on or before the same date, taking a like receipt therefor from the trust company, countersigned as before mentioned; and that any balance over such costs and expenses of foreclosure would be applied in settling with those first mortgage bondholders who should not join in the purchase of the road, and the remainder, if any, was to be paid into the treasury of the new company. The circular was accompanied by a notice, which formed part of it, that in accordance with the plan, a committee of trustees, the names of the members of which were given, had been constituted, and that the office of the committee was at a designated place in the city of New York. Among the names was that of Mr. Dechert, to whose name the addition of "secretary" was made.

The complainant, on the 13th of January, 1879, was the owner of one of the first mortgage bonds, and on that day she offered it to the Central Trust Company, for the purpose of depositing it with that company, under and in pursuance of the before-mentioned plan of re-organization, but the trust company refused to receive it, and referred her to the re-organization committee. On that day she offered the bond to the committee, and it was received by them through Mr. Dechert, their secretary, pursuant to the plan of re-organization, and to enable her to participate therein.

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At the same time, she paid to the secretary her assessment, and took the receipt of the committee. The receipt was as follows :

- “ Re-organization Committee of the New Jersey Midland Railway Co.
 “ Deposit of First Mortgage Bonds. Name, Mrs. J. G. Hitchcock.
 “ Address, Longmeadow, Mass.
 “ One bond of \$1,000 each, Nos. 235. Coupons commencing Feb'y 1, 1874.
 “Amount of bonds.....\$1,000 00
 “Assessment..... 2 50
 “ Date of deposit, Jan. 13, '79.

“ Rec'd the above,

“ H. P. DECHERT,

“ Sec'y.”

Three days afterwards, Mr. Dechert, as secretary of the committee, deposited the bond with the trust company, together with other bonds amounting to \$4,000, and took from the trust company a certificate for the five bonds in his own name, individually.

The property of the railroad company was sold under the foreclosure, and was bought in by or in behalf of the re-organization committee, in pursuance of the before-mentioned plan, and a new company was formed according to the statute. The committee approved a plan for the settlement or compromise of the debts, claims or liabilities of the old company, but on what terms they refuse to tell the complainant. They have now ceased to act. The new company is about to issue its bonds in place of those of the original company, which were deposited with the committee under the plan, and as authorized by the provisions of the act “respecting railroads sold under mortgage” (*Rev. p. 944*), and to deliver them to the persons holding and presenting the certificates of deposit of the trust company, under the plan, and it refuses to recognize the receipt given to the complainant, or to deliver her any bond therefor, unless it is accompanied by the certificate of the trust company. Neither Dechert nor the committee has ever returned her bond to her or given her any certificate of deposit of the trust company therefor or anything representing it, nor have they or any of them given to her any other bond, certificate or receipt whatever. She is still the owner of

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the bond. She has in vain demanded of the committee the return of her bond or the delivery to her of the certificate of the trust company acknowledging the deposit of it, and she has, but in vain, demanded from the new company a bond of \$1,000 in place of her bond, according to the plan of re-organization. The bill is filed against the new company and the members of the committee, and it prays that the complainant may be decreed to be the owner of the bond, and to be the person to whom any bond under the plan of re-organization is to be given instead thereof; and that the new company may be decreed to issue a bond to her instead of the bond delivered to the committee, or that the defendants may be decreed to account to her for the proceeds or fair value of her bond, and to pay it or them to her accordingly, out of the funds in their hands arising from assessments on the bonds; and that the new company may be enjoined from issuing any bond to any one but the complainant, instead of her bond; and it prays for relief generally.

The defendants demur. For causes, they assign want of equity, want of a necessary party (the present holder of the complainant's bond), and that the complainant has an adequate remedy at law. They insist that the complainant does not show herself entitled to the relief she seeks because she does not show that she complied with the provisions of the plan of re-organization. It is necessary, they insist, that she should show that she deposited her bond with and paid her assessment to the trust company. For some reason which does not appear, the trust company, as before mentioned, declined to receive them, and referred her to the committee, its principal (for the trust company was merely the agent or depository of the committee), and she went to the committee and delivered the bond, with her assessment thereon, to them. This was a compliance with the direction of the plan; and in receiving the bond and assessment themselves, the committee waived the provision for deposit with the trust company. Nay, after they received the bond and assessment they deposited the former with the trust company themselves, and if their officer (and he was not only their officer, but one of their number), fraudulently took a certificate from the trust company in his own

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favor, when he ought to have taken it in favor of the complainant, that fact cannot prejudice her. For aught that appears, the committee still hold her bond. The act of Dechert, their secretary, in receiving the bond and assessment, and depositing the former, was the act of the committee. As before stated, the trust company was the mere depositary of the committee. According to the circular, its receipt was not sufficient to entitle the bondholder to participate in the benefits of the re-organization unless it was countersigned by the representative of the committee. The provision for depositing the bonds and assessments with the trust company manifestly was for convenience and security merely. The object in requiring the counter-signature was that the committee might know and keep an account of the deposits. The committee themselves had the power to receive bonds and assessments if they saw fit to do so. And where the depositary declined, from some scruple or reason, to receive a bond, and referred the bondholder to the committee, as its principal, the delivery of the bond to the committee was clearly entirely legitimate. If the bond had been subsequently, and before it was deposited with the trust company by the committee, lost, no question would have arisen as to the right of the complainant to the benefit of her bond in the re-organization of the railroad company. But it is because their secretary has been guilty of a fraudulent appropriation to his own use of her bond that the question is raised. That fraudulent conduct was in the course of his business as agent of the committee, and the complainant can no more be prejudiced by it than one who deposits a check in a bank for collection, for his account, would by the fraud of the bank messenger in embezzling the proceeds of the check after receiving them from the drawee. Nor do I perceive any reason whatever why the complainant, on the statements of the bill, should not participate in the benefits of the plan of re-organization. It does not appear that there is any adverse claim. It does not appear that her bond has been assigned by Dechert, or that the certificate which he received from the trust company is not in the possession of the committee or the new company. Nor is the bill demurrable for want of parties; for, as has just

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been remarked, it does not appear that any other party than those who are now defendants has any interest in the controversy. Obviously, the complainant has not an adequate remedy at law. The demurrer will be overruled.

JOHN HENDEE

v.

CARRIE R. HOWE et al.

A judgment creditor of a mortgagor, who had been made a party defendant to a bill to foreclose a mortgage (a prior lien on the premises), before answering, and with intent to redeem the mortgage, tendered the complainant the amount due thereon, together with the accrued interest and taxed costs, which he, without objecting to the amount of costs, refused to accept.—*Held*, that his conduct was obstructive and vexatious, and that he must pay the costs of a cross-suit to redeem, although it appeared that the costs of notice to an absent defendant in the foreclosure suit were unknown to the clerk, and had not been taxed or tendered. The judgment creditor, however, was decreed to pay those costs.

Bill to foreclose first mortgage. Cross-bill of judgment creditor of mortgagor to redeem. On final hearing on pleadings and proofs.

Mr. L. Newcomb, for complainant in original suit.

Mr. S. M. Dickinson, for complainant in cross-suit.

THE CHANCELLOR.

The original suit was brought to foreclose a mortgage on land in Cumberland county, given by William H. Swift to John Hendee, the complainant in that suit, dated June 13th, 1877, and made to secure the payment of \$800 in one year, with interest payable semi-annually. The cross-bill was filed by Carrie R. Howe to redeem the mortgage. She is a judgment

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creditor of the mortgagor. Her judgment was recovered in the Cumberland circuit court in October, 1877, for \$1,654, debt and costs. The bill in the original suit was filed December 19th, 1879. The judgment creditor answered January 20th, 1880. On the 16th of that month she, with a view to redeeming the mortgage, tendered to Mr. Hendee the full amount of principal of the mortgage, and the interest thereon, and the costs of the suit as taxed. The tender was refused. Hendee says it was accompanied with the condition that he should execute an assignment of the mortgage to Miss Howe, but I am satisfied, from the proof, that what was demanded was merely a receipt or acknowledgment of the payment and the delivery of the bond and mortgage. Hendee alleges that he was not told that the tender was in behalf of Miss Howe, but the weight of evidence is to the contrary, and it is clear that he and his solicitor knew that it was made for her. There is no proof that there was anything more due for costs than was tendered. When the tender was made there was no objection to the amount of costs. It was not alleged that costs had been incurred which were not known in the clerk's office—cost of notice to an absent defendant—and that therefore the costs taxed by the clerk were not the full amount of the costs of the suit up to that time. The cross-bill states that the full amount of principal, interest and costs as taxed was tendered. The answer to that bill merely denies this, and alleges that there was more money due at the time for principal, interest and costs than was tendered. No objection whatever was made, at the time of the tender, to the amount tendered. The answer is silent as to the refusal to accept the tender. It is apparent that the conduct of Hendee was obstructive and vexatious. Miss Howe had a right to redeem. Her judgment is admitted by the answer to the cross-bill. Hendee, by his refusal to permit her to redeem, has unnecessarily and vexatiously put her to the expense of the cross-suit, and he should pay the costs of it. On the filing of the cross-bill the amount tendered was paid into court. Miss Howe will be permitted to redeem, on paying such taxable costs incurred in the original suit as were not included in the bill of

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costs as taxed. Hendee is of course entitled to the money paid into court.

OLIVER S. BELDEN

v.

ANNIE W. BELDEN.

A wife, with her child, left her husband, in 1873, owing to his utter inability to maintain them, and after he had pledged a mortgage belonging to her, and constituting nearly all of her separate property, to secure his own debt, and pawned her jewelry and silver plate. Soon after she left, she, by the advice of her relations, declined to return to him until she could be satisfied of his ability to support her. He apparently acquiesced in her living separate from him till 1878. In 1879 she absolutely refused to return to him.—*Held*, that her conduct, prior to 1879, if desertion at all, was not obstinate, within the meaning of the statute.

Petition for divorce. On final hearing on pleadings and proofs.

Mr. John T. Woodhull and *Mr. F. C. Lenthorp*, for petitioner.

Mr. P. L. Voorhees, for defendant.

THE CHANCELLOR.

This suit is brought for a divorce from the bond of marriage, on the ground of desertion. The parties, who both then resided here, were married in Philadelphia, December 16th, 1868. They immediately thereafter went to Salem, in this state, to reside, and lived there together until March 25th, 1873, when the defendant, with her infant child, left that place, with her husband's consent, and went to Kingston, where she has ever since resided. The petitioner, Dr. Belden, alleges that his wife deserted him in April, 1873. The petition was filed January 5th, 1880. She, in her answer, denies the desertion, and says that she was constrained to leave him, by his cruel treatment of her. The facts

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appear to be, that they lived together in Salem until March, 1873, when, in consequence of the petitioner's pecuniary embarrassments, she went to Kingston, with his consent, to stay for a short time, and, apparently, until he could make new arrangements for the support of his family. She expected to return to him, but he did not provide the means for her to do so. Some correspondence passed between them soon after she left. It appears to have ceased in May, 1873. About the middle of that month she sent her brothers, Henry L. R. Van Dyck and Dr. Van Dyck, and Captain Garwood, to Salem, for her furniture, and it was delivered up to them by the defendant. He had sold her carpet, however, before they came. Soon after this time there were one or two interviews between the petitioner and the defendant, in one of which, at the house of her brother, Dr. Van Dyck, in Philadelphia (in the summer of 1873), he requested her to return to him, and she replied that she had decided not to do so until he knew how he was going to take care of her. The next time he saw her was at Princeton Junction, in the summer of 1874, and she says he then tried, unsuccessfully, to borrow \$100 of her; but he denies it. She swears that he did not then ask her to return to him, and he does not say that he did. No communication of any kind passed between them, after that time, until the summer of 1878, when he wrote to her, soliciting her to return. He had an interview with her in the summer of 1879, and she then virtually refused to return to him. She gave him the impression, he says, that she would return when she could see her way clear to do so. In that same summer, in an interview with her brother, H. L. R. Van Dyck, she declared, in substance, that she could not return to her husband. When she left the petitioner, in March, 1873, it was, as before stated, because of his financial troubles. He was then in a great strait, pecuniarily, beyond all question. He had pawned her watch and chain, and the jewelry which he had given her; also her wedding gifts of silver, and most of her other silver plate. She had, when she was married, a separate estate, in money or securities, to the amount of above \$6,000. Of that estate he had induced her to assign a bond and mortgage for \$4,300 as collateral secu-

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urity for a debt of his, and she had given into his hands, at his request, all the rest of her property, except that bond and mortgage, and he had spent it. Her brother, Dr. Van Dyck, redeemed her watch and jewelry, and part of the silver, for her, and obtained an assignment to himself in her behalf of the bond and mortgage, by paying the debt (it amounted to about \$800), as security for which they were assigned. The petitioner refused to consent to the assignment to Dr. Van Dyck, unless he was absolutely discharged from all liability to his wife for the debt. The defendant alleges that she suffered for the want of the necessaries of life towards the latter part of her stay in Salem, and that appears to be the cruelty charged in her answer. If she did, it was undoubtedly due to the petitioner's poverty. That he was poor, then and subsequently, there seems to be no room to doubt. It is unnecessary to refer to the evidence on that subject. That it was difficult for him to get a living for himself and family seems to be equally clear. His poverty, however, was not a ground for the abandonment of him by the defendant, and it appears that she never entertained the intention to remain away from him until her brother, Dr. Van Dyck, moved by his interest in her welfare, and in view of the petitioner's embarrassments and poverty, advised her not to return to him until she had evidence that she would be properly maintained. Dr. Van Dyck testifies that after she left Salem he found her looking very ill, and that she appeared to be in great trouble; that he discovered, on a visit to Kingston, that the petitioner had been there, and seemed to be in a great deal of trouble also, and had borrowed money of his (Dr. Van Dyck's) brother; that he (Dr. Van Dyck) insisted on the defendant's giving him a statement of her affairs and condition at home, which she did; that she told him her property was in pawn, and her furniture held for debt, and that she had no money with which to pay the expenses of her return to Salem, and he says he then told her she must remain away from Salem until her friends had evidence that she would be cared for. When, in the summer of 1873, the petitioner asked her to return to him, and she replied that she had decided not to do so, until he knew

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how he was going to take care of her, she undoubtedly acted on the advice just mentioned. From that time the petitioner had no communication with her, except in the interview at Princeton Junction, until he wrote to her in September, 1878. In a letter dated on the second of that month, after speaking on the subject of his proposed removal of the remains of their deceased child from the Salem burying-ground to the cemetery at Princeton, he says: "Another object in writing to you is to ascertain if you would be willing to accept or make any reasonable proposition by which the unnatural *status* of our relations could in any respect be relieved. I deem it my duty, as a professing Christian, to make a special effort to relieve it, if possible." He concludes the letter with a prayer that she may be guided to receive the communication in the right spirit. From the summer of 1873 to the fall of 1878, he does not appear to have solicited her to return to him. Her furniture was under levy for his debt in 1875, and at his request she went to Salem to release it, but she left again on the same day. She says that he did not then invite her to stay, and though he says his "recollection is" that he did, he does not say so positively, and, indeed, he does not, in his testimony, reckon that among the occasions on which he asked her to return to him. Nor did he contribute to her support, or that of her child, during that period of more than five years. She has but little property, and is, and before her marriage was, disabled to a great extent, by permanent stiffness of her left arm (the result of disease), from doing any work to obtain the means of livelihood, except light sewing. She has lived, since her separation from her husband, in a part of her late father's homestead, which part was secured to her by his will, in view of her crippled condition, for a refuge, in case of necessity. Up to 1879 she never refused to return to the petitioner, but was apparently willing to do so, if it appeared he could support her. In that year she appears to have refused to return. He then offered, if she would return, to place \$500 in the hands of his lawyer, as security that he would support her, and to agree to pay over to the lawyer \$100 a month thereafter, for the support of the fam-

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ily, and house-rent; the money to be drawn by her in sums not to exceed \$25 a week. She, nevertheless, declined to return, and gives as her reason that she did not know that the petitioner could carry out his proposition. It is needless to say that a wife cannot deal thus with her husband and not render herself liable to the charge of deserting him. But the conduct of the petitioner, from the time when the defendant left him up to the letter of September 2d, 1878, was such as to lead to the conclusion that he acquiesced in the separation during that time. It is true he says he asked her to return in the summer of 1874, but she denies it, and I see no reason to give greater credit to him than to her on this point. Neither of them is corroborated. A divorce will not be granted on the testimony of the applicant alone. He does not appear to have sought to induce her to return to him from the summer of 1873 to the fall of 1878, but, on the other hand, left her to struggle along, and with great difficulty, for the support of herself and her child, without aid of any kind, or even any communication from him. He did not discharge his duty towards her in the premises. If her separation from him could be regarded as willful desertion from the time when, in 1873, she is proved to have declined to return, it is clear that during the period that intervened up to September, 1878, he did not, in the language of the court in *Cornish v. Cornish*, 8 C. E. Gr. 208, make the advances or concessions which a just man ought to have made to put an end to the desertion. His financial embarrassment in the spring of 1873 was manifestly very great, and distressing to both him and her, and his conduct towards her in respect to her property was very aggravating, as well as mortifying. He appeared, indeed, to be unable to provide for her, and yet, after she left him, she was willing to return, and but for family advice, which was honestly and sincerely given, and intended for her benefit, would undoubtedly have done so. Nor had she any evidence whatever, even by his bare declaration, from the summer of 1873 to the fall of 1878, that he was in anywise able to contribute anything to her support, or that of their child. When she declined to return, in 1873, he obtained from her four out of five dollars she had borrowed for her own

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use, to buy him a pair of shoes. Her letters to him—while in the latest ones she expresses distrust of his ability to support her—are not unaffectionate. Those written in 1873, judging from their language, are the letters of a loving and faithful wife. No intention to desert her husband appeared in her language or conduct up to 1879. And if she could be held to have deserted her husband in 1873, as I think she could not—for though there was cessation of cohabitation, there was no intention to desert—her desertion could not be said to have been obstinate.

The petition will be dismissed, with costs.

AMANDA S. JOYCE

v.

ANNA M. HAINES et al.

A bill to establish a resulting trust averred merely that C. (the husband) was married to K. in 1827, and that lands were conveyed to him in 1831, but that the consideration therefor was paid by the wife "out of her own estate."—*Held*, insufficient. The court cannot infer, from such averment, that the wife had a separate estate, and that the consideration for such land was paid therefrom, or for its benefit. As the law stood at her marriage, her property, other than her separate estate, vested in her husband, and even if the money was her separate estate, she might have given it to her husband.

Bill for relief. On general demurrer.

Mr. C. E. Hendrickson, for demurrant.

Mr. W. A. Barrows, for complainant.

THE CHANCELLOR.

The bill states that Caleb A. L. Shinn and Rebecca, his wife, were married in 1827, and that in 1831, Joseph Kirkbride, assignee of Abraham Hays, conveyed to Shinn certain real estate

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in Vincenttown, in Burlington county; that the consideration, \$1,092, named in the deed and actually paid, was paid by Mrs. Shinn "out of her own estate," although the title to the property was conveyed to Shinn, and that no part of it was paid by him; that afterwards, in 1844, Shinn and his wife conveyed the premises, with other property, to his mother in law, Ann Lodge, by voluntary conveyance, and merely to shift the title to elude his creditors, and she, in 1854, conveyed the property back to him, without consideration, except the agreement for re-conveyance made between her and him, made on the conveyance to her; that part of the property was conveyed away by Shinn and his wife; that she died intestate, in 1874, leaving him and her two daughters, the complainant and Anna M. Haines, surviving her; that they were her only heirs at law; that Shinn died in 1880, leaving a will, which has been proved, by which he gave all his lands in Vincenttown to his daughter, Mrs. Haines; that the latter claims to be the owner in fee of so much of the property conveyed by Kirkbride, assignee to Shinn, as before mentioned, as the latter was seized of at his death, and that she, with her husband, has mortgaged it, with other land, to Sarah A. Tomlinson. It "charges and insists" that on the death of Mrs. Shinn intestate, her equitable estate and interest existing in the property by reason of her having paid the purchase-money therefor, descended to and vested in Mrs. Haines and the complainant, as tenants in common, subject to Shinn's tenancy by the curtesy, and that he had no further or other estate in the property except as trustee for them. It denies that Mrs. Haines has any title as devisee, but alleges that she has only title to an equal undivided half, as one of the heirs at law of her mother, while it insists that the complainant is, in like manner, entitled to the other half. It prays a discovery merely, with general relief. The bill is founded on the theory that a resulting trust in favor of Mrs. Shinn, in the property, arose from the fact that the consideration of the conveyance from Kirkbride, assignee to her husband, was paid by her out of her own funds. The averment is that it was paid by her "out of her own estate;" not that it was paid out of her separate estate. The pleader may

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have intended to aver that she had a separate estate, and that the consideration was paid out of it for her own benefit, or that of her separate estate, but he has not done so. If the money had been part of her separate estate, and she had given it to her husband as a gift, to enable him to pay the consideration money of the conveyance, no trust would have resulted to her. If the money was not her separate estate, under the law as it stood at the time of her marriage, it became the property of her husband, and, of course, no trust resulted from his use of it in paying the consideration money of the conveyance of land to him. The bill "charges and insists" that a trust resulted to Mrs. Shinn by reason of her payment of the purchase money merely, and that on her death, her husband had, beside his curtesy, no estate in the property except as trustee for the complainant and her sister, Mrs. Haines, but there is no averment that the property was bought for Mrs. Shinn, or was to be held in trust for her, or that she was to be the owner of it, notwithstanding the title was taken by her husband. The claim to relief is wholly based on the allegation that the consideration money was paid by her out of her own estate, without even denying that it was paid on account and for the benefit of her husband. It is too much to intend, from the simple averment that the money was paid out of her own estate, that she not only had a separate estate, but that the money was paid out of it, and for her own separate benefit, in the purchase of the property. It would seem, from the statements of the bill, that the idea of the complainant is that the mere payment by a married woman, before the passage of our married women's act, of the purchase money of land conveyed to her husband, out of money which was hers at her marriage, or became hers afterwards, though not settled to her separate use, of itself created a resulting trust in the land, in her favor, and made her husband trustee thereof for her, though the land was bought by him and for his own use. It is unnecessary to say that that proposition cannot be maintained. If the bill is based on the fact that Mrs. Shinn had a separate estate, out of which and for the benefit whereof the payment

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was made, to the end that she should be the beneficial owner of the property, to her separate use, the averments are insufficient. The demurrer will be sustained.

MARY M. PERRINE, administratrix &c.,

v.

PETER VREELAND, executor &c.

A testator gave the interest on certain funds, which were to be securely invested on bond and mortgage, to his wife for life or widowhood, for the support of herself and their son, with a proviso that on her remarriage, her right to such interest should cease, and it should be payable for the support of the son only; and if she should remain unmarried until the son attained his majority, he should be entitled to one-half of the income for his own use; and that at her decease all the estate should go to the son absolutely, so soon as he should marry or become of age, but if he should die without heirs, or before he came into full possession, then over. The widow and two others were appointed executors. The testator died in 1840, and his widow, who, with one of the other appointees, proved the will, remarried in 1847. In 1848, the executors who proved the will filed their final account, and invested the fund as directed by the will, until its repayment to the executor in 1873, when it was invested in first mortgage on city lots, then worth three times as much as the fund invested. Afterwards, the mortgagor became insolvent, and the executor, on foreclosure, was obliged to buy in the property, in order to protect the fund. The son came of age in 1860. He was married to complainant in 1858, and died in 1864, leaving a child born of the complainant in 1860, who is still living.—*Held*,

(1) On construction of the will, that the son was entitled to the entire estate on the remarriage of the widow, and the gift over was defeated by the son's leaving lawful issue surviving at his death.—*Held*, also,

(2) That the executor's discretion as to the security of the investment in 1873 appearing to have been fairly exercised, and he having obtained advice from reputable counsel that the principal of the fund did not go to the son unless he survived his mother, he is guilty of no breach of trust, either because he continued to hold the fund after the gift over was defeated, or because of the investment in 1873, and that the land is the fund.

Bill for relief. On final hearing on pleadings and proofs.

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Mr. S. B. Ransom, for complainant.

Mr. C. H. Hartshorne, for defendant.

THE CHANCELLOR.

Cornelius W. Vreeland, now deceased, by his will, dated January 6th, 1840, after ordering payment of his debts and giving a specific legacy to his wife, directed that a certain lot of land which he then owned should be sold, and the proceeds used as thereafter provided. He then proceeded as follows :

" It is my will that the money raised by the sale of the aforesaid lot be put out at interest, secured by bond and mortgage, and to remain so, together with all my money that I now have standing upon bond and mortgage, or that may be due me at my decease, until such time as hereinafter specified. It is my will that the interest or income of all my money or estate be paid to my beloved wife Caroline yearly and every year during her natural life, provided she remains my widow, for her to have and to use the same for her own support and the education and support of my son William. But in case she should marry, then it is my will that her right and title to said interest or income should cease with the date thereof; and in this case, my executors are to keep, hold and use the interest or income of all my estate for the sole benefit, education and support of my son William. And, further, it is my will that my beloved wife Caroline, in case her life should be spared, and she remain my widow until my son William should marry or become of age, that she should pay, or cause to be paid, to my son William the one-half of the income of all my estate, provided he should exact the same, for him to have and use the same as he may think proper.

" At the decease of my beloved wife Caroline, I give and bequeath to my son William all my estate, together with all the proceeds or profits, so soon as he shall marry or become of age, for him to have and to hold the same for himself, his heirs or assigns, forever. In case my son William should die without heirs, or before he comes into the full possession of my estate, then and in that case I give and bequeath to my surviving brothers and sisters all my estate, to be equally divided between them, share and share alike, for them to have and to hold the same for themselves, their heirs and assigns, forever."

He appointed his wife and his brother, Peter V. B. Vreeland, Peter Vreeland, the defendant, and Jasper Cadmus, jun., his executors. He died in February, 1840. The will was proved by Mrs. Vreeland and Peter V. B. Vreeland. In 1848 (the widow had then remarried), they filed their final account of the

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estate, which was allowed and passed September 20th, 1848; by which they admitted that the amount of the net balance of the estate in their hands was \$2,944.77. The testator's widow married Henry M. Burch, May 2d, 1847. Mr. Burch died August 27th, 1858, and she married her present husband, John Shilliday, November 2d, 1864. The testator's son William came of age in 1860. He was married to the complainant August 2d, 1858. He died May 24th, 1864. He had a child, a daughter, by the complainant, born March 14th, 1860, who is still living. His widow took out letters of administration on his estate on June 15th, 1864, and letters of guardianship of her daughter on July 18th, 1865. She married her present husband in 1866. She brings this suit to recover from the executor and executrix the estate given by the will to her husband, the testator's son William.

The estate appears to have been securely invested by Peter V. B. Vreeland previously to October 14th, 1873; and it having been paid to him, he then invested it on bond and mortgage of nineteen vacant building-lots, of the usual size of twenty-five feet front by one hundred feet in depth, in the city of Bayonne, in Hudson county. They were worth \$500 apiece. The interest being in arrears, he began proceedings in this court for foreclosure of that mortgage and sale of the mortgaged premises, in 1876, and obtained a decree, March 14th, 1878, for \$3,470.05, including costs. At the sheriff's sale, the property was bid up by another person against his bids to nearly \$3,000, at which price it was struck off to him, as executor, and a deed from the sheriff was taken by him, accordingly, for it, under which he still holds it. The mortgagor is insolvent. The interest on the investment appears to have been collected and paid over, up to October 14th, 1875. The property is, as before stated, still in the hands of the executor, and it cannot now, for want of a market for it, be sold for enough to pay the principal and interest of the investment up to this time, besides taxes, but if turned into cash now, there would be a loss. The complainant insists that she is entitled to an account from the executors of the fund, with interest from October 14th, 1875, and that they are bound to pay it over to

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he ~~is~~ in cash. On the other hand, the executor Vreeland, who ~~also~~ has had charge of the estate since the settlement of the ~~final~~ account, answers that he has been and is advised, and now ~~insists~~, that the principal of the fund is not payable, by the ~~terms~~ and true construction of the will, until the death of the ~~testator's~~ widow; and, further, that if the complainant is now ~~entitled~~ to the principal, he is not bound to account in cash, but ~~only~~ for and in the property. He appears not only to have been ~~careful~~ in investing the fund, but also to have taken pains to ~~ascertain~~ when it was payable. He took the advice of two ~~practicing~~ lawyers of this state on the subject, obtaining a written opinion from one of them, at least, and was advised by both ~~that~~ the principal of the fund was not payable until the death of the ~~testator's~~ widow; and he acted upon the advice. It appears, ~~also~~, that no demand was made upon him for the payment of the ~~principal~~ of the fund until just before this suit was brought.

By the will, the interest of the fund is given to the widow for life, provided she remains the testator's widow, for her own support and the support and education of the testator's son William; and it is expressly provided that on her remarriage, her right and title to the interest shall cease, and that thereafter the executors shall hold the estate for the sole benefit, education and support of William; and, further, that if the widow should live and remain unmarried till the majority or marriage of William, she should then pay him half of the income, for his own use absolutely, if he should demand it. The will then proceeds as follows:

"At the decease of my beloved wife Caroline, I give and bequeath to my son William all my estate, together with all its proceeds or profits, so soon as he shall marry or become of age; for him to have and to hold the same for himself, his heirs or assigns, forever. In case my son William should die without heirs, or before he comes into the full possession of my estate, then and in that case, I give and bequeath to my surviving brothers and sisters all my estate, to be equally divided between them &c."

The testator evidently intended to give the entire estate to William on the decease or remarriage of his widow. He expressly provides that on her remarriage, her interest in the

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income (which was her entire interest in the estate) should cease, and the executors should therefore keep, hold and use the interest or income of all the estate for the sole benefit, education and support of William; and though the bequest of the estate to William is, by the language of the will, on the death of the widow, and not on her remarriage, he manifestly intended to give it to William on the happening of the latter event. He contemplated the possibility of the death of his widow before William should have attained to his majority or have been married, and therefore provided that so soon after her death as he should become of age or marry, he should have the whole estate absolutely. The gift over is, according to its terms, in the event of his dying without heirs (meaning children), or before he should come into the full possession of the estate. The testator's intention was that the estate should go over in case William died without issue, and (substituting the word "and" for the word "or," to effectuate the testator's intention), before having come into, or become entitled to, the full possession of the estate. The widow's interest in the estate ceased on her marriage to Mr. Burch, in 1847; and thereafter, until William's majority, the executors were to hold the estate in trust for him for his sole use. He had a child born in 1860, in which year he attained his majority. He died in 1864. The child is still living. The fact that William left a child living at his death put an end to the limitation over; it could never take effect. From the date of his mother's remarriage, the executor was, by the will, to hold the estate for William's use, without limitation; and such gift of the use was equivalent to a gift of the entire estate. It appears by the context, too, that in fixing the time when the estate was to go to William, at the death of his widow, the testator was contemplating the contingency of her dying while his widow, and giving directions accordingly; and there is, therefore, nothing in that provision, when properly construed (as there is not when all the provisions are considered together), to prevent or militate against the vesting of the estate in William on his mother's remarriage. The estate, therefore, was vested absolutely in him at his death; and at his death it was payable to his legal represent-

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ative. His administratrix was therefore entitled to it, as she still is.

It remains to consider the further question as to the account and payment. The executor has retained the estate in his hands until this time, under a misapprehension as to his duty under the will. He took pains to inform himself as to his duty, as before stated. He consulted not only one, but two, experienced lawyers, obtaining, as before mentioned, the written opinion of at least one of them on the subject. Their view of the subject, and his consequent action upon it, was acquiesced in by the administratrix. It is true she was without any information as to her rights in the matter, except such as she derived from his counsel and himself; but the information given to her by them was honestly and fairly given, and was the result of careful inquiry and examination. She herself might have got the advice of counsel, and she was at liberty to obtain an adjudication on the subject. The executor cannot be regarded as having been guilty of a breach of his trust in declining to pay over the fund to her, under the circumstances. His trust with regard to the fund still continued, and he was bound to take the same care of it as before the administratrix was entitled to demand it. Under the circumstances, his duty in regard to it was not changed, and his liability was not increased, by the fact that he held it and declined to pay it over to her after she became entitled to it. He managed it with care and made proper investments, and paid over the interest so long as interest was collectible on the investment. When, in 1873, he invested it on the lots in Bayonne, he appears to have been guilty of no negligence. Though the lots were vacant, yet they were in a growing city, and were worth at the time at least \$500 apiece. There were nineteen of them, and they were then worth \$9,500—more than three times the amount of the fund. The want of a market for the property is due to the great revulsion which has taken place since the investment was made. At sheriff's sale, under the foreclosure proceedings, the property was bid up to nearly \$3,000 by another person, and the executor, for the protection of the fund, deemed it prudent to buy it in. His action in that matter does not appear to have

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been such as to render him liable to the charge of breach of trust. He is bound to account for the fund, but is not bound to pay it over in cash. He may pay it over in the property itself. He will be ordered to pay it over in the property, which he will be required to convey to the complainant, as administratrix, on receiving payment from her of what may be due to him for costs and fees paid in the foreclosure proceedings and on the sheriff's sale, and taxes, if any, paid by him, and his commissions, and his costs of this suit. Or, the trust may be closed by the sale of the property under the direction of this court, and the proceeds, after deducting the before-mentioned payments to the trustee, paid over to the complainant.

GEORGE FINE

v.

JOSEPH B. KING et al.

Lands of an insolvent decedent were sold, free of his widow's dower, to pay his debts. To secure such dower, the purchaser gave the administrators a mortgage for \$2,700, the interest whereof was payable to the widow for life, and the principal, at her death, to her husband's heirs at law. The purchaser also gave another mortgage on the premises, prior to the widow's, which was afterwards paid off. The widow's dower was, in fact, only \$1,700, and the purchaser afterwards borrowed \$2,600 of the complainant. By an agreement with the administrators, without the privity or consent of the widow, the complainant's mortgage was to be the first lien on the premises—the administrators agreeing with the lender to indemnify him against the widow's claim to priority; and this agreement was consummated by canceling the widow's mortgage, and substituting another for \$1,700, in lieu of it, subsequent to complainant's.—*Held*, in a suit for foreclosure of the lender's mortgage, that the rights and priority of the widow were unaffected thereby, but that relief could be obtained by her, in the suit, only by cross-bill.

Bill to foreclose. On final hearing on pleadings and proofs.*Mr. J. G. Shipman*, for complainant.*Mr. O. Jeffery*, for Mary Rinehart.

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THE CHANCELLOR.

The administrators of George Rinehart, deceased, under an order of the orphans court of Warren county, sold his real estate to pay his debts. It was sold free of the dower of his widow, Mary Rinehart. The property was sold to Joseph B. King, who, in order to raise part of the purchase money, gave a mortgage thereon to William Kiley, for \$3,600, and for the rest, gave a mortgage for \$2,709.75, to the administrators. By the terms of this latter mortgage, the interest was to be payable to Mary Rinehart, the dowress, for life, and at her death, the principal was to go to her husband's heirs at law. By an agreement between the administrators and Kiley, his mortgage had priority over the mortgage given to them. The Kiley mortgage was paid off and canceled in December, 1876. The widow was not entitled, for her dower, to interest on the whole amount of the mortgage to the administrators, but only on \$1,773. In order to pay the difference to the administrators, King borrowed \$2,600 of the complainant, on a mortgage to be given him on the property, but the complainant would not lend the money on the security unless it should be made the first encumbrance on the property. It was thereupon agreed between him and the administrators that his mortgage should have precedence over the mortgage to secure the dower. The arrangement was carried out by the cancellation of the mortgage for \$2,709.75, and the substitution of a new one for \$1,773, in its place, subsequent to that of the complainant. The widow knew nothing of this arrangement, and the cancellation and substitution were made without her knowledge or consent. In this suit, which is for foreclosure of the complainant's mortgage, she, by her answer, sets up, on this ground, her claim to priority. It is clear, from the evidence, that the complainant knew when the arrangement by which he obtained priority for his mortgage was made, that the mortgage held by the administrators was held in trust to secure the widow's dower, and he knew that the *cestuis que trust* had not consented to the arrangement. He not only admits it, but it appears, by his testimony, that the administrators agreed with him that they would personally indemnify their *cestuis que*

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trust against any loss which the latter might sustain by reason of the loss of priority. The property will not bring enough to pay both mortgages in full, and a loss therefore will, in the existing order of priority, be sustained by the beneficiaries, under the mortgage to the administrators. Such of them as did not consent to the arrangement are entitled, in equity, to a re-instatement, to the extent of their interest therein, of the original mortgage to the administrators, thus improperly canceled. The widow alone makes defence. She, however, cannot obtain relief in the present state of the pleadings. She can only have it by cross-bill, for, in order to obtain her rights, she needs affirmative relief against the complainant.

The testimony taken on the motion to admit the widow to answer after default, was, by consent of counsel, used on the hearing as evidence in the cause. A consent to that effect should be filed. The answer, which is put in without oath, in accordance with the requirement of the bill, is defective in its statement as to the widow's ignorance of and non-consent to the cancellation and substitution. The defect is manifestly due to mere inadvertence of the pleader. The answer may be amended in that respect. When leave was given to the widow to answer after the default, leave was also given to file a cross-bill, if so advised. None was filed, and, on the hearing, it was understood that one might be filed, if deemed necessary by the court, to give the widow the relief she claimed. She will therefore have leave to file a cross-bill, and the cause will stand over for further hearing, after the issue shall have been joined, and the testimony closed—if any further testimony shall be taken—in the cross-suit.

Crosland v. Hall.

SARAH CROSLAND

v.

REUBEN P. HALL and wife, et al.

A willful misrepresentation as to the income derived from the royalty on a **certain** patent, which induced a landowner to exchange his property for a one-half interest in such royalty, is sufficient evidence of fraud and deceit to set **aside** the conveyance.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. S. Mitchell, for complainant.

Mr. D. J. Pancoast, for defendant.

THE CHANCELLOR.

On the 24th of December, 1877, the complainant, Sarah Crosland, held the legal title to a tract of land of about eighteen acres, in Landis township, in the county of Cumberland, and, according to the bill of complaint, was the owner thereof. The property was improved. There was on it a dwelling-house, besides other buildings and improvements. It appears to have been worth about \$5,500. She also owned certain personal property on the premises, consisting of household furniture in the house,

NOTE.—Analogous cases may be found, where actions at law have been maintained for deceit as to the rent received from premises (*Ekins v. Tresham*, 1 *Lea*. 102; *Lysney v. Selby*, 2 *Ld. Raym.* 1118, 1 *Salk.* 211; *Wilson v. Fuller*, 3 *Q. B.* 68; *Brown v. Castles*, 11 *Cush.* 350; *Blacks v. Catlett*, 3 *Litt.* 140); or suits sustained or relief granted therefor in equity (*Brereton v. Couper*, 2 *Bro. P. C.* 535; *Tottenham's Estate*, 15 *Ir. Ch.* 308; *Dimmock v. Hallet*, *L. R.* (2 *Ch.*) 21; *Flint v. Woodin*, 9 *Hare* 618; *Abbott v. Swoorder*, 4 *De G. & Sm.* 448; *McShane v. Hazelhurst*, 50 *Md.* 107; *Wise v. Fuller*, 2 *Stew. Eq.* 257; *Boynton v. Hazelboom*, 14 *Allen* 107); or the profits derived from a theatre (*Harris v. Kemble*, 5 *Bligh* 730; *Bryan v. Hitchcock*, 43 *Mo.* 527); or the amount of business done at an inn (*Dobell v. Stevens*, 3 *B. & C.* 623; *Pearson v. Wheeler*, *Ry. & Moo.* 303; *Pilmore v. Hood*, 5 *Bing. N. C.* 97; *Bowring v. Stevens*, 2 *C. & P.* 337; *Richardson v. Dunn*, 8 *C. B. (N. S.)* 655; *Hutchinson v. Morley*, 7 *Scott*

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was made, to the end that she should be the beneficial owner of the property, to her separate use, the averments are insufficient. The demurrer will be sustained.

MARY M. PERRINE, administratrix &c.,

v.

PETER VREELAND, executor &c.

A testator gave the interest on certain funds, which were to be securely invested on bond and mortgage, to his wife for life or widowhood, for the support of herself and their son, with a proviso that on her remarriage, her right to such interest should cease, and it should be payable for the support of the son only; and if she should remain unmarried until the son attained his majority, he should be entitled to one-half of the income for his own use; and that at her decease all the estate should go to the son absolutely, so soon as he should marry or become of age, but if he should die without heirs, or before he came into full possession, then over. The widow and two others were appointed executors. The testator died in 1840, and his widow, who, with one of the other appointees, proved the will, remarried in 1847. In 1848, the executors who proved the will filed their final account, and invested the fund as directed by the will, until its repayment to the executor in 1873, when it was invested in first mortgage on city lots, then worth three times as much as the fund invested. Afterwards, the mortgagor became insolvent, and the executor, on foreclosure, was obliged to buy in the property, in order to protect the fund. The son came of age in 1860. He was married to complainant in 1858, and died in 1864, leaving a child born of the complainant in 1860, who is still living.—*Held*,

(1) On construction of the will, that the son was entitled to the entire estate on the remarriage of the widow, and the gift over was defeated by the son's leaving lawful issue surviving at his death.—*Held*, also,

(2) That the executor's discretion as to the security of the investment in 1873 appearing to have been fairly exercised, and he having obtained advice from reputable counsel that the principal of the fund did not go to the son unless he survived his mother, he is guilty of no breach of trust, either because he continued to hold the fund after the gift over was defeated, or because of the investment in 1873, and that the land is the fund.

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the bargain was made there was a mortgage of \$400 on the Crosland property. At the making of the agreement for exchange, Hall agreed to lend Crosland \$500 to enable him to go to Australia. To raise that money and \$200 for himself, Hall and his wife executed a mortgage for \$700 to Crosland on the property, which Crosland was to negotiate. Leverett Newcomb, to accommodate Crosland and to enable the latter to get the \$500 by means of the mortgage for \$700, agreed with Hall and Crosland to advance the \$200 to Hall on the security of the assignment of the bond and mortgage by Crosland to him. He took the assignment accordingly, and advanced \$20 on account of the \$200 to Hall at the time, and agreed to pay the balance of the \$200 in five or six days thereafter. A few days afterwards, he paid to Hall \$24.10. Shortly thereafter, Crosland, having become suspicious that Hall had defrauded him in the exchange, borrowed \$80 of Newcomb to pay his expenses to Chicago, where he went to make inquiry about the patent. A new assignment of the bond and mortgage was thereupon made by Crosland to Newcomb, to secure the sum of \$280, the amount which Newcomb had agreed to pay Hall and the \$80 lent by him to Crosland. Afterwards, Crosland having become satisfied that Hall had defrauded him, forbade Newcomb to pay Hall any more money, but Newcomb, notwithstanding, did, on Hall's demand, pay him the balance of the \$200. Hall and his wife, soon after the exchange was made, went into possession of the Crosland property,

Gifford v. Carvill, 29 Cal. 589; *Tuck v. Downing*, 76 Ill. 71; *Small v. Atwood*, You. 461; *Jennings v. Broughton*, 17 Bear. 234; or the quantity of saltpetre which so much nitrous earth would yield (*Perkins v. Rice*, 6 Litt. 218; *Peyton v. Butler*, 3 Hayw. 141); or the quantity of wool that sheep would shear per head (*Bryant v. Crosby*, 40 Me. 9); or the extent of sales of an engraving (*Shaeffer v. Sleade*, 7 Blackf. 178); or of a patent (*Allin v. Millison*, 72 Ill. 201; *David v. Park*, 103 Mass. 501; *Somers v. Richards*, 46 Vt. 170; *Gatling v. Newell*, 9 Ind. 572; *Swazey v. Herr*, 11 Pa. St. 278).

But representations as to probable sales, or value, or productiveness, are not actionable (*Miller v. Young*, 33 Ill. 354; *Bishop v. Small*, 63 Me. 12; *Hughes v. Antietam Co.*, 34 Md. 317; *Crossman v. Penrose Co.*, 26 Pa. St. 69; *Pedrick v. Porter*, 5 Allen 324; *Pike v. Fay*, 101 Mass. 134; *Hawkins v. Campbell*, 6 Ark. 513; *Cooley on Torts* 484; 3 Am. Law Rev. 430).—REP.

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and have held it ever since. The complainant knew nothing of the transaction with Hall (she went to Australia and has never returned), until after it had been completed. She never affirmed, but, on the contrary, repudiated it. She knew nothing of the transaction with Newcomb. She brings this suit by her next friend to obtain a decree declaring the deed and the transfer of the personal property, and the mortgage to Newcomb, void, and requiring Hall's wife to reconvey the property, real and personal, to her, and Newcomb to give up the mortgage to be canceled. Her claim to relief is based on the ground that the deed for the real property is void, because, though it was signed and acknowledged by her, yet there was then no grantee named therein, and she never gave lawful authority to her husband or any one else to insert therein the name of any person as grantee; and next that the deed was obtained under fraudulent misrepresentations made by Hall to her husband. As to the mortgage, she insists that if the deed to Hall's wife is void, the mortgage is void also. I do not consider it necessary to pass upon the question whether the deed is void in law or not. I am satisfied that the conveyance of the land and the transfer of the personal property ought to be set aside on the ground of fraud. In the exchange, Hall made a false representation of at least one very material fact to Crosland. The complainant, in her bill, alleges that Hall represented to Crosland that he had received for half of the royalty under the patent, \$800 a year, in quarter-yearly payments. The answer not only denies that he made that statement, but alleges in substance that what he said was that he had received \$200 a year, in quarter-yearly payments. But Crosland swears that Hall told him, when they were bargaining for the exchange, that the half of the royalty under the letters-patent had paid him and was then paying him \$800 a year, and was "getting better all the time, and was only in its infancy." Major Walker, a counselor at law in Vineland, at whose office and by whom the blanks in the deed were filled, and the assignment of the interest in the patent-right and royalty drawn, and by whom the execution of it was witnessed, testifies that while they were in his office, at the time of the exchange of the papers,

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HALL said that he had received from the royalty from \$300 to \$500 a quarter, and that that income would enable Crosland to live at his ease. Crosland swears to the same conversation. The defendants, Hall and wife, by their answer, not only deny that he told Crosland that Hall had received, for half of the royalty, \$800 a year, but they give the impression that they mean to say that he never made any representation on the subject to Crosland at all, but that all the representation that was made was made, not to Crosland, but to the complainant herself. They swear, in the answer, that the complainant herself, in or about October, 1877, offered to sell the property to Hall in consideration of the half interest in the letters-patent and royalty, and that he told her that the amount received was \$200 a year; but it is clear that this statement is entitled to no credit whatever. It is true, they produce a witness, Ransford P. Crowell (neither Hall nor his wife was sworn in the cause), who testifies that, in November, 1877 (he says it was just before the shop was destroyed by fire), in his meat-shop, in Vineland, he heard a conversation between the complainant and Hall, who was employed there, in which she said to Hall that "she was going away, and would leave with her husband a deed in blank, with her name signed to it, for her husband to dispose of as he thought best, and that she was willing that her husband should make the trade if he thought best." But the shop was burned in September, 1877, and Hall and his wife say, in the answer, that it was in October, 1877, when the complainant spoke to Hall on the subject, so that if the conversation took place in the shop, it must have been in or before September, which is prior to the time mentioned by Hall and his wife as the time when, as they say, the complainant first spoke to him on the subject. But further: the complainant swears that she never had any conversation with Hall on the subject, and Crosland swears that it was in December, 1877, when the matter was first spoken of, and then it was by Hall to him. The statement as to the amount which Hall had received for the half of the royalty was an important and material representation, calculated to deceive Crosland as to the value of that which Hall was then proposing to give him in ex-

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change for the property. The royalty was derived from the sale of the patented article, and the amount which Hall had received and was then receiving was a criterion of its value. That it was so intended appears from Crosland's testimony, which is as follows: Hall, knowing that the Crosland property was for sale, in December, 1878, called on Crosland, on the premises, and looked at it, and inquired of Crosland the price. He was told it was \$5,000 cash. He said he did not know whether his family would like to live in the country or not. Crosland exhibited to him a photographic view of the buildings, and Hall said he would take it home and show it to his family. A few days afterwards, Crosland saw him at the post-office, and asked him how his family liked the place. He answered that they liked it very well, and he said he would go with him and look at it again. They went together to the property accordingly, and, after Hall had examined it again, he and Crosland went into the house, and then he proposed the exchange of the half of the patent-right and royalty for the property. Crosland swears that Hall then said that he had a proposition to make, and on Crosland's asking what it was, he replied that he owned a royalty in a plaster, a galvano-electric plaster, which was then, as he said, being manufactured by a firm in Chicago. Crosland, in his testimony, proceeds as follows:

"Said he, 'Now I will give you one-half interest in it [the royalty] for this property; it will realize you \$800 a year—\$200 a quarter—and you will receive it in three days after it is due; see what a nice thing that will be for you and your family—and it will get better all the time; the thing is only in its infancy; the company has got \$20,000 invested in it, and I would not take \$20,000 to-day for the other half of the royalty; I assure you, Crosland, I would not make you such an offer as that if I had not got plenty to live on without it; I've got \$3,000 a year coming in from other sources, and I am doing a deed of charity to give you half of the royalty; I don't care about a farm for myself; if I make a trade with you it shall be for my boys to farm and keep them out of mischief; I would build a brick residence up in the peach orchard for myself and wife, and let the boys run the farm;' he said the half of that royalty was worth a hundred farms; I said, 'Mr. Hall, are you telling me the truth?' 'Crosland,' said he, 'do you suppose I would tell you a lot of lies, and rob you and your children out of your little home? don't you know I am a member of the church, and in good standing?' He then held up his hands as if he were praying, and said, 'As

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God is my judge, Crosland, I wish He may strike me dead if every word I have told you is not true; I am your friend; I am none of your Vineland sharks; what I offer you will be a living for you and your children; now, if we make such a trade, I don't want you to say a word about it to any one, and so long as you are going to Australia with Mr. Stiles, it is nobody's business; there are men in this town [Vineland] who envy me because I can live without work; they would like to know my business, but I will not tell it to them; now if you will come down town with me, we will go to E. M. Turner's [Mr. Turner was a lawyer in Vineland] office, and get the thing fixed up;' I said 'Now, Mr. Hall, if I make a trade with you, and all is true what you have told me, how am I to get to Australia?' Hall said, 'I value my royalty at \$6,000, and you value your place at \$5,500; I'll lend you \$500 to pay your way to Australia; you have a mortgage on your place for \$400; the \$500 I lend you and the \$400 on the place will make \$900; now, Crosland, I won't be hard on you; I will give you a good chance; I will let you receive the royalty for two years—then the \$500 I loan you and the \$400 will be stopped out of the royalty, and then the royalty is yours again.'"

Crosland adds:

"Well, of course I agreed to trade him; he was to give me the \$500 when we got to the house, or bring it with him; it was to be cash when the deed was made."

Crosland further says that in Major Walker's office, when the papers were exchanged, he asked Walker what he thought of the trade he had made, and Walker said that it "was too much like a lottery, those patent plasters," and Hall replied, "Major Walker, I am giving Crosland what will be a living for himself and family, and it will realize him from \$300 to \$500 a quarter;" and Crosland is, as before stated, corroborated on this point by Major Walker. Those statements made by Hall as to the amount which he had derived and was deriving from the half of the royalty which he was selling to Crosland, were untrue to his knowledge. He had knowledge on the subject, and Crosland had none, and his asseverations of the truth of his statements were calculated and designed to induce Crosland to rely on them. The misrepresentation was a gross fraud, and is sufficient ground for setting aside the conveyance and transfer of Mrs. Crosland's property. Hall and his wife have not attempted to show that the half of the royalty had any value whatever, but, on the hearing, relied on the want of proof on the subject of value or pro-

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ductiveness. But the fact that he made the statement in Major Walker's office, that the half had produced and was producing him from \$300 to \$500 a quarter, or from \$1,200 to \$2,000 a year, is established, and supports the testimony of Crosland that Hall told him that he had realized and was realizing from it \$800 a year. The bill alleges that the half had never produced as much as even \$200 a year, and the answer does not deny it. Nor does it deny the allegations of the bill as to the small and inconsiderable value of the letters-patent and royalty. The evidence shows gross and deliberate deceit, with design to circumvent, on the part of Hall. It may be added that the bill alleges that he had anticipated the royalty up to April 1st, 1879, although he transferred the half of it, from January 1st, 1879, to that date, to Crosland, and the answer does not deny it. There will be a decree requiring Hall and wife to reconvey the property, both real and personal, to the complainant, and Crosland will be required, at the same time, to deliver to Hall an assignment, duly executed, for the interest in the patent-right and royalty &c. assigned by Hall to him, and to pay any royalty he may have received thereunder. Hall and wife will be required to account and pay for the use and occupation of the property, real and personal, and he will be required to account for and pay the \$200 received by him from Mr. Newcomb, with interest thereon. As to the amount due Mr. Newcomb on his mortgage, the complainant must do equity. She must pay the money, \$280, with interest, advanced by him on the security of the assignment of the mortgage. Of that money, \$80 were advanced to enable Crosland to make inquiries, with a view to recovering back her property if a fraud had been committed by Hall. That, as well as the rest of the \$280, was paid on a mortgage which was given by Hall and his wife on the property, to which the latter had title by a deed executed by the complainant and her husband, and, so far as Mr. Newcomb knew, it was duly made and executed and acknowledged. The mortgage was given by Hall and his wife to raise money for them—\$200 for their own use and the rest to be lent by them to Crosland. Newcomb paid \$44.10 of the \$200 before any notice not to pay was given him, and as

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to the rest he took the advice of counsel before paying it. He should be protected, under the circumstances, from loss in the setting aside of the conveyance, and he should have his costs payable, in the first instance, by the complainant, but recoverable by her from Hall. Hall will be required to pay costs of both the complainant and Newcomb.

THOMAS D. HOXSEY et al.

v.

THE NEW JERSEY MIDLAND RAILWAY COMPANY et al.

In 1868 and 1869 the New Jersey Western Railroad Company, acting under legislative authority, constructed parts of a railroad in this state, and the complainants and others subscribed and paid for its stock. In 1870 it was consolidated with other railroads, built or to be built, by an act authorizing compensation to such stockholders of the New Jersey Western as were dissatisfied therewith. A mortgage, covering all the property of the consolidated roads, was given, and the legality of the consolidation recognized by subsequent legislation. Against some of the defendants there appeared to be some grounds for applying for relief.—*Held*, that it cannot be satisfactorily determined, on the statements of the bill, whether the complainants have, by acquiescence, lost their rights as stockholders, and the demurrer, being too general, was overruled.

Bill for relief on general demurrer.*Mr. J. W. Taylor*, for demurrant.*Mr. T. D. Hoxsey*, for complainants.

THE CHANCELLOR.

The bill states that the complainants, Thomas D. Hoxsey and John C. Lloyd (who exhibit the bill not only for themselves, but also in behalf of all other stockholders of the New Jersey Western Railroad Company whose stock is similarly situated), own 500 shares of the stock of that company; that the company was

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incorporated under a special act of the legislature of this state, approved March 21st, 1867; that in 1868 and 1869 it surveyed and located for itself the route of a railroad from Hawthorne, in Passaic county, to a point at or near Bloomingdale, in that county, and constructed, or nearly constructed, the road so located; that the construction was by means of subscriptions, among which were those of the complainants and the other stockholders in whose behalf the bill is filed, to the capital stock of the company, duly made and paid in for the purpose; that the money received from the subscriptions of those by and for whom the bill is filed largely contributed to the work; that in 1870, an act "to authorize the consolidation of the capital stock, property, powers, privileges and franchises of the New Jersey, Hudson and Delaware Railroad Company with those of the New Jersey Western Railroad Company, the Sussex Valley Railroad Company, and the Hoboken, Ridgefield and Paterson Railroad Company, or any or either of them," was passed and approved; that it provided a plan of consolidation by means of a joint agreement of the companies agreeing to consolidate, but the bill avers that no such agreement was entered into, "by which the rights of the complainants as stockholders in the corporate rights, powers, property, privileges and franchises of the Western company were lost or surrendered," and that the defendants allege that there was a verbal agreement between the stockholders of the Western company and the new company, the consolidation, to the effect that the stockholders of the Western company were to surrender their stock in exchange for stock of some other company which would pay annual dividends of three and a half per cent. The bill, while it denies that there was any such agreement, states that the complainants would have accepted such exchange, but none was ever effected or offered. It further states, substantially, that the Midland company claims to have acquired the rights, franchises and property of the Western company by consolidation.

The suit is brought to vindicate and establish the rights of the complainants as stockholders of the Western company in and to the property and franchises which that company owned at the time

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of the alleged consolidation. The bill alleges that they have never surrendered or lost their rights, but that, in violation of those rights, and without any warrant of law or any authority whatever, the franchises of the Western company have been usurped, and its property taken into possession by a company claiming to be a consolidation of which the Western company was an element, and that they have never consented thereto, and that have not been compensated for their stock. On the argument of the demurrer, the only ground assigned was that the claim made by the bill is a stale one.

The act of 1870, before referred to, provided for consolidation by means of a joint agreement for consolidation under the corporate seals of the corporations proposing to consolidate, and subscribing the terms and conditions thereof, and the mode of carrying it into effect, but the agreement of the directors was not to be deemed the agreement of the companies until it should have been ratified or assented to by such number of the stockholders of the respective companies as should represent three-fourths of the capital stock actually subscribed, the ratification to be in writing, and signed by the holders of the stock, or their duly authorized agents or proxies, and acknowledged or proved before an officer authorized to take the acknowledgments of conveyances of real estate. After the making and ratification of such agreement, and the filing of a duplicate or counterpart thereof in the secretary of state's office, and immediately upon and after the first election of directors by the consolidated company, the consolidation was to take effect. The act provided that the new company should be known as the New Jersey Midland Railway Company, and should succeed to the powers, privileges, franchises, obligations and liabilities of the companies consolidated, that all contracts made with either of the companies should be performed and discharged by the consolidated company, and that all property, real, personal and mixed, and all debts due on whatever account, as well as of stock subscriptions and other things in action belonging to the corporations, should be taken and deemed to be transferred to and vested in the consolidated company, without further act or deed; and that all property, rights of way, and all and every other interest, should be as effectually

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the property of the New Jersey Midland Railway Company, as they were of the former corporations parties to the agreement. The act provides for the condemnation, on due compensation, of the stock of any stockholder who should dissent from the agreement, the compensation to be paid by the consolidated company; and thereupon and thereby the stock condemned was to be surrendered and assigned to it. The bill states that the defendants claim that a consolidation was duly effected, and the complainants, while they admit that proceedings looking to a consolidation were taken, deny that such proceedings were in anywise valid as against them as stockholders of the Western company. They insist, too, that the mortgages (made in 1870, 1871 and 1873) given by the Midland company, and which covered the Western road, were not valid as against them or their rights, as stockholders in the property which was of the Western company, and that the decree in foreclosure thereof does not affect their rights as such stockholders, because they were not permitted to litigate their rights therein. They allege that though the mortgaged property was sold under the foreclosure by the master, yet it was under protest from them, and an assertion by them of their rights to it. The bill is filed to compel the payment of the claim of the complainants and others, as before mentioned, for their stock, before possession is given under the master's sale, and to that end prays an injunction. It also prays a decree that the defendants be required to pay the amount of the par value of the stock, and interest thereon, and it prays general relief, also. The defendants are Oscar Keen, the master to whom the execution for the sale of the mortgaged premises was directed and delivered, and by whom they were sold; the New Jersey Midland Railway Company; Garret A. Hobart, receiver of that company; George S. Coe, George Opdyke and Abram S. Hewitt, trustees; Jabez P. Pennington, trustee; Garret A. Hobart and John W. McCullough, receivers; Abram S. Hewitt, again, as trustee, and Charles Parsons. All of them, except Mr. Hewitt, have demurred. It does not appear by the bill why some of them were made parties.

So far as the injunction is concerned, the relief sought would

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not be granted. The complainants have stood by for many years and have taken no action to protect their claims as stockholders. Not only have the mortgages mentioned in the bill, amounting in the aggregate to \$14,500,000, been given on the property of the Midland company, including in it the Western road, but the legislature has, by public act, distinctly and expressly recognized the validity of the consolidation (*P. L. of 1871 p. 1093*), and otherwise recognized the existence of the consolidated company as a corporation. (*P. L. of 1872 pp. 890, 924; P. L. of 1873 p. 969.*) Under such circumstances, and after such apparent acquiescence on the part of the complainants for so long a time, the decree in the foreclosure proceedings would be executed, notwithstanding their claim, and the purchaser under the execution would be put in possession of the mortgaged premises.

But whether the complainants have absolutely lost all their rights as stockholders by acquiescence or not, cannot be satisfactorily determined on the statements of the bill, even with the aid of the acts of the legislature just mentioned. No relief could be granted against Charles Parsons or Jabez Pennington on the bill; for it does not appear why they are made parties; nor against the trustees under the mortgages, or the receivers, for there is no ground laid for it in the bill. But there appears to be a ground of relief, on the statements of the bill, against the Midland company.

The demurrer is too extensive. It will, therefore, be overruled.

THE UNITED NEW JERSEY RAILROAD AND CANAL COMPANY et al.

v.

THE STANDARD OIL COMPANY et al.

A foreign corporation, without any authority whatever, laid a pipe for transporting oil on the bottom of a navigable river, on lands belonging to the state, and underneath a draw-bridge of complainant. At that point the channel was

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so deep and wide as that the laying of the pipe there would not interfere with the bridge. A preliminary injunction to prevent such pipe-laying was denied, because,

(1) The pipe had been laid before the application for the injunction was made.

(2) The lands where the pipe crosses the bridge belong to the state, and the complainants have no legislative authority to reclaim them.

(3) The pipe, as laid, does not interfere with or obstruct the maintenance and operation of the draw-bridge nor any lawful filling.

(4) The complainant's franchise of carrying oil is not exclusive, and therefore does not prevent any other company from doing so, if not in contravention of the company's franchise, much less so when it appears the defendants intend to transport only their own oil.

Bill for relief on bill and answer and affidavits &c. Motion for preliminary injunctions.

Mr. I. W. Scudder, for complainant.

Mr. R. Gilchrist and *Mr. A. P. Whitehead*, of New York, for defendants.

THE CHANCELLOR.

The complainants, the United New Jersey Railroad and Canal Company and the Pennsylvania Railroad Company, ask for a preliminary injunction to restrain the defendants, the Standard Oil Company, a foreign corporation, and certain persons who are acting for that company in the matter, from "interfering, or in any way attempting to interfere, with the complainants, by laying any pipe, either on or over or under the railroad tracks of the complainants on the draw of their railroad bridge over the Hackensack river, or in any manner, for the purpose of laying such pipes, interfering with or occupying the railroad tracks or other property of the complainants, and from laying pipes in the Hackensack river under or over the before-mentioned bridge, or through, along, under or over the draw therein, and from laying any pipes on land under tide-water in that river, and from flowing oil in the pipes already laid by them."

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The grounds of the complaint are that the defendants have, **a**gainst the protest of the complainants, and by forcible persistence, laid a six-inch iron pipe in the channel of the Hackensack **r**iver, under the draw of the railroad bridge of the complainants, **t**hrough which pipe the oil company intends (and such is the **p**urpose for which the pipe is laid) to convey oil from the railroad of the New York, Lake Erie and Western Railroad Company, at or near Snake Hill, in Jersey City, to the works of the **o**il company at Constable's Hook, in the city of Bayonne; and **t**he complainants claim that the pipe, though laid in the channel **o**f the river, which is navigable tide-water there, is laid on land **w**hich they own, or to which they have some claim of title, and **a**lso that the purpose is, in view of their own rights, an unlawful **o**ne, viz. to carry oil, which the complainants have a franchise to **c**arry, for tolls; in the exercise of which franchise they insist **t**hey ought to be protected.

In the case presented, the complainants do not appear to be **e**ntitled to the injunction.

In the first place, the pipe was already laid when the bill was **f**iled, and there is therefore no ground for an injunction to **r**estrain the defendants from laying it. It is laid on the bottom of **t**he river, in the channel, where the water is at least twenty feet deep at low tide. It is capable of being moved twenty feet or more laterally each way, so as not to interfere with the driving of any piles or building any abutments by the complainants which might be requisite or proper for the maintenance of the bridge. It can be raised or lowered, as occasion may require, and will in no wise interfere with any filling where it is laid. Though the complainants make positive claim of title to the land whereon the pipe is laid, the claim is not sustained, but, on the contrary, it appears that the land is the property of the state. The act of 1869 (*P. L. of 1869 p. 1026*), under which the complainants assert a right to it, authorizes the United Companies to reclaim and to erect wharves and other improvements in front of any lands then owned by, or in trust for, them, or either of them, or which were held by any company in which they had the controlling interest, adjoining the Kill von Kull or

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any other tide-waters of this state, and to have, hold, possess and enjoy the same as owners thereof, when so reclaimed and improved; provided such improvement should be subject to the regulations, where applicable, of the riparian commissioners as to the line of solid filling and pier lines; and that they should pay into the treasury of the state a designated sum of money for the privilege, and should file, in the secretary of state's office, on or before a designated day, a map and description of the lands under water in front of the upland before referred to. Neither in terms nor by implication did this act give the companies any title or claim to the land under the channel of the river, but the title thereto still remained in the state. The state is not here complaining of any purpresture, and the complainants show no special damage arising to them from the laying or continuance of the pipe in the channel. They have no claim to an injunction on this ground. The defendants do not appear to have been guilty of even a trespass upon the property of the complainants.

But the complainants insist that they are entitled to the injunction on the ground of an unlawful interference with their franchise to transport goods for tolls on their railroads. This claim may be briefly disposed of. In the first place, their franchise obviously cannot be construed into a monopoly of transportation, so as to exclude all competition, by whatever means, in the transportation of goods for hire; and, in the next place, it may be added (though that is not material in this case), the object of the oil company appears to be the conveyance, by means of the pipe, of its own goods alone.

The oil company is, as before stated, a foreign corporation. It appears to have acted, in laying the pipe in the river, entirely without authority. Indeed, it does not pretend to have had any. The case presented, however, does not, as before shown, warrant the granting of a preliminary injunction. It will be denied, but, under the circumstances, without costs

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THE CENTRAL RAILROAD COMPANY OF NEW JERSEY et al.

v.

THE STANDARD OIL COMPANY et al.

After complainants had constructed their railroad tracks through a city, part of the lands which its tracks traversed was condemned by the city, in order to cross them with a street. This necessitated a bridge, which was sixteen feet above the tracks. The bridge, although built by the company, was paid for by the city. Subsequently, the defendants, by virtue of a resolution passed by the city authorities, laid a pipe for transporting oil along and underneath the surface of the street, and crossed complainants' tracks at and on a level with, and alongside of, the bridge. A preliminary injunction to prevent such crossing, applied for by the railroad company and its receiver appointed by this court, was refused, because,

- (1) The pipe had been laid before the application for the injunction was made.
- (2) To justify its allowance, there is shown no irreparable injury, either from leakage of the oil to be transported, which is highly inflammable, or interference with the elevation of the bridge, if complainants desire to raise it.
- (3) The complainants have no monopoly in carrying oil, and hence cannot object to lawful competition.
- (4) No contempt towards this court appears by defendants' action.

Bill for relief. On bill and answer and affidavits. Order to show cause why injunction should not issue.

Mr. B. Williamson and Mr. B. Gummere, for complainants.

Mr. R. Gilchrist and Mr. A. P. Whitehead, of New York, for defendants.

THE CHANCELLOR.

The Central Railroad Company of New Jersey became the owner, by purchase, of a tract of land, which it bought for the purposes of its road and business, and over which its tracks were laid through the city of Bayonne. When it bought the land, it took title in fee. Streets had been, by due authority, laid out over it by mapping. It built its road over it, and at the place

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where Thirtieth street, as laid on the map, crossed it. The road was constructed in a cut. The city subsequently took, by condemnation, part of the land of the railroad company for that street. A bridge was necessary at the crossing over the railroad, which at that place was about sixteen feet below the grade of the street. The railroad company built the bridge, but was allowed for the cost of it in the assessment upon it, for the benefits of the street to its land not taken. By its charter it was bound, as is now claimed in its behalf, to build the bridge. After the bridge was built, the Standard Oil Company, a foreign corporation, obtained permission (granted by resolution) from the city to lay pipes in the street. The pipes were to be part of a line which it proposed to lay for a conduit for oil from the Erie railroad at Snake Hill, in Jersey City, to the oil company's works at Constable's Hook, in Bayonne. It neither obtained nor asked for any permission, either of the railroad company or of the receiver thereof appointed by this court on proceedings in insolvency, who was in possession of and operating the road, under the order of this court; and it had no authority from the legislature in the premises; but claiming, or acting on the assumption, that the bridge was part of the street, and neither having nor professing to have any authority except that derived from the municipal authorities of Bayonne, it laid pipes (six inches in diameter) at and alongside of the bridge, but, as it insists, not supporting them thereon or thereby, and when the bill was filed, it maintained, or was in the attitude of maintaining, the pipes there by forcible resistance against the receiver of the railroad company. The complainants, the railroad company and the receiver, invoke the protection of this court against this action of the oil company in laying and maintaining the pipes, and, to that end, ask for a preliminary injunction. They base their claim to this relief on the ground of irreparable injury, insisting that the oil company had no lawful authority to lay the pipes, because, as they urge, in the first place, the city could give it no right to do so, and, in the next place, if the city had the power, it could not give the authority by resolution, but must do so by ordinance; and, further, that the oil company is unlawfully, and by mere usurpa-

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tion, imposing upon the bridge, which the railroad company claims to own, or the place where the pipe is laid, a servitude at once unauthorized, inconvenient and dangerous, and an unwarrantable invasion and usurpation of the rights and property of the railroad company, and that, too, for the purpose of enabling the oil company to compete with the railroad company in the exercise and enjoyment of its franchise in the transportation of oil for tolls over its road, or, at least, to deprive it of tolls which it would otherwise get (and to which it has a right) by such transportation. It is also urged that the action of the defendants in digging through the abutments of the bridge and laying the pipes without permission of this court (in whose hands, as before mentioned, the railroad company's property and affairs were and are), was a contempt of court, and ought to be characterized and dealt with accordingly.

The oil company, on the other hand, insists that the municipal government had authority to empower it to lay the pipe in the street, and it contends that the bridge is part of the street; and in this connection, it further claims that the city, under its charter, by the condemnation proceedings, acquired the fee of the land taken from the railroad company for the street, and not merely a right to use it for the purposes of a highway.

The railroad company was, by its charter, when it built the bridge, bound to "construct and keep in repair good and sufficient bridges or passages over or under its railroads where any public or other road should cross them, so that the passage of carriages, horses and cattle should not be impeded thereby" (*P. L. of 1847 p. 133 § 9*); and the complainants insist that the bridge was built by the railroad company under its statutory obligation to construct and maintain it. But it appears that, though built by it, it was, in fact, paid for by the city, and the defendants claim that therefore it is to be regarded as the property of the city, and, as such, subject to its use as part of the street, for reasonable, lawful municipal servitudes and uses. They also claim that the city, by the condemnation, obtained a right to use the air space above the railroad for such purposes.

The city, by its proceedings for opening the street, condemned

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land crossing the railroad to the full width of the street. The street appears to be of the width of eighty feet, of which forty-eight are devoted to travel by vehicles and the rest to use as sidewalks. The bridge is of the width of fifty feet. If the city is to be held to have acquired by the condemnation only the right to a convenient crossing for travel, obviously it must be held to have acquired nothing more than the railroad company was, by its charter, bound to furnish.

The defendants, as before stated, insist that, by the condemnation, the city acquired a fee in the land condemned. By the original charter, which was granted in 1869 (*P. L. of 1869 p. 398*), it was provided that on condemnation the land should vest in the city, and by the supplement (approved March 28th, 1873) to the act revising the charter (*P. L. of 1873 p. 469*), it was enacted that, on condemnation, the fee simple should be vested in it; and the defendants claim that, notwithstanding the proceedings for condemnation were begun before the passage of the latter act, yet it, by relation back, gave the city a fee in the land condemned. But apart from the obvious question raised by the mere statement of this claim, it is to be remarked that the claim to a fee in the land in question is in direct contrariety to the adjudication of the supreme court in *N. J. Southern R. R. Co. v. Long Branch Comm'rs*, 10 Vr. 28, in which it was held that a municipal corporation under a condemnation for a street across a railroad track, acquires only a right of way; and, according to the doctrine of that case, the contrariety would still exist, though it be conceded that the provision of the supplement of 1873, before referred to, though posterior in date to the beginning of the proceedings therein, applies to the condemnation under consideration.

Whether the city has the right to use the space above the railroad for any other purpose than travel by means of the bridge, is a question in dispute between the parties.

It is urged by the complainants, however, that the supreme court has decided that a municipality cannot impose on the land taken for its streets any uses or servitudes except those sanctioned by law or custom, and that therefore it is established that t

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leave given to the oil company in this case, even though it had been by ordinance, instead of resolution, was unauthorized.

But a still further question is raised: The revised charter of the city (*P. L. of 1872 p. 686*) confers power (*p. 704*) on the municipal authorities to regulate the manufacture and keeping of gun powder, petroleum, fireworks and all other dangerous and combustible articles, and the defendants insist that, under this power, the city has a right, with a view to public protection, to authorize the transportation of petroleum through the city by means of underground pipes, and, to that end, to give the use of the streets, or parts of them, for the purpose. It is enough for the present purpose to say that a question of construction is thus presented. The complainants' asserted right, on which the claim to relief by injunction is founded, is in dispute.

But if the city has neither any right, nor even any shadow of right, under its charter, to authorize the laying of the pipes, then the action of the defendants is unwarranted, and is a trespass, and equity will not interfere by preliminary injunction, in case of trespass, except where irreparable injury is threatened. It is established in this state that a preliminary injunction will never be ordered unless from the pressure of an urgent necessity, and to prevent what, in equity, is regarded as irreparable damage. *Citizens Coach Co. v. Camden Horse R. R. Co.*, 2 *Stew. Eq.* 299. In that case the following language of Chancellor Williamson, the elder, is quoted with approval:

"An injunction ought not to be allowed in all cases of trespass, nor to protect persons in the enjoyment of every right. The court always, to restrain a trespasser, expects a strong case of destruction or irreparable mischief to be made out, or that the trespass should have so long continued as to become a nuisance. A perseverance in committing acts of trespass is not sufficient."

In the case of *Citizens Coach Co. v. Camden Horse R. R. Co.*, the preliminary injunction complained of, the order for which was reversed, was issued to restrain the coach company from using the complainant's railroad tracks, in competition with it in the business of carrying passengers, in the exercise of its

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franchise. Such injury was held by the appellate tribunal not to be of a character to warrant interim interference.

This case presents no condition of circumstances demanding, by reason of the threatened infliction of irreparable injury, the intervention of this court at this stage. The pipes had been laid when the bill was filed. The allegation of danger from fire, in view of the leakage of oil from the pipes, and the highly inflammable nature of the substance, is met by proof that there is no danger, and the offer to make all such appliances to protect the complainants against the possibility of injury from leakage of the pipes as this court may direct.

It is suggested by the complainants that the existence of the pipes will be an obstruction and impediment to raising the bridge (which, it is said, is contemplated, and which they allege is necessary for the protection of the lives of brakemen on their freight cars), and perhaps prevent it entirely. But in that view, suffering the pipes to remain where they have been put, and permitting them to be used, cannot be regarded as an irreparable injury, for this court can provide for that contingency, if need be, when occasion requires.

The oil company insists that the pipes are not supported by the bridge, and that if the bridge were removed they would still stand in place. Whether they in anywise depend on the bridge for support, is at most a subject of dispute.

But it is urged that the object of the laying of the pipes is to deprive the complainants of part of their business, and so to diminish the value of their franchise to transport goods for tolls, inasmuch as the oil company intends, by means of the pipes, to transport oil for itself, and may intend also to transport it by this means for others.

The complainants have no claim to a preliminary injunction on this ground. In the first place, the case just cited (*Citizens Coach Co. v. Camden Horse R. R. Co.*) would seem to be conclusive authority on this point. And, in the next place, they have no monopoly of transporting goods or passengers for tolls by all means whatever, and, of course, they have no claim to protection against lawful competition.

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It will not be out of place to remark, though my conclusion in no wise rests upon it, that the oil company denies that it intends to transport goods for others by means of the pipe, but alleges that it intends to transport only its own goods thereby, and that, most manifestly, cannot be construed into an invasion of any franchise of the complainants.

As to the imputed contempt, the defendants do not appear to have been actuated by any disposition to contemn or disregard the power or dignity of this court.

On the ground, then, that there is no necessity or ground for interim interference, and without passing upon the disputed questions, except as to the right of the complainants to monopoly of transportation by all ways or means, I am of opinion that the order to show cause should be discharged, but, under the circumstances, it will be without costs.

ELIZA A. DANSER

v.

WILLIAM WARWICK.

1. A valid trust of personal property may be created by mere spoken words, and proved by parol evidence.

2. A valid trust of a mortgage debt may be created by parol, for though a trust thus created will not pass any interest in the land held in pledge, yet it is good as to the debt, and will entitle the *cestui que trust* to the payment of his debt out of the proceeds of the sale of the land.

On final hearing on bill, answer and proofs taken before a master.

Mr. George C. Beekman, for complainant.

Mr. Joel Parker, for defendant.

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THE VICE-CHANCELLOR.

\ The complainant is the widow of David C. Danser. She seeks to have a parol trust established and enforced against the defendant. She alleges that her husband, some months before his death, assigned the bond and mortgage in controversy to the defendant, upon a parol trust or understanding that he would forthwith, or by a short day, transfer them to her. The transfer to the defendant was intended to be merely a step in vesting her with title. The assignment to the defendant bears date February 1st, 1875, and Danser died on the 13th day of the following September. \ The bond and mortgage were in Danser's possession at the time of his death, and have since then been constantly in the possession of the complainant. The defendant has never asked for them, nor attempted to get possession of them. A month or six weeks prior to Danser's death, the defendant directed an assignment to be drawn to the complainant, stating to the person to whom he gave the direction that he must draw it for Danser, who would pay him. He, at the same time, said 'it was right that the old lady—referring to the complainant—should have the bond and mortgage. \ Danser, at this time, was prostrated by the disease which shortly afterwards caused his death. The defendant did not remain to execute the assignment, but said he would return soon and do so. He did not return that day. He was subsequently informed, on two or three different occasions, while Danser was living, that the assignment had been drawn and was ready for execution. On each occasion he said he had forgotten or neglected to execute it, but would call soon and do so. He never fulfilled his promise. Two or three weeks after Danser's death, he called for the assignment Danser had made to him, and which he had left when he gave direction for the draft of the one to the complainant, and stated that he meant to do what was right about the matter, but he would not execute the assignment to the complainant until things were fixed up; Danser owed him. He took both papers and has never executed the assignment to the complainant.

This narrative comprises only those facts which are not disputed by either party.

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The defendant denies that the mortgage was transferred to him subject to a trust, but says, on the contrary, that the assignment was made to satisfy a promissory note he held against Danser, upon which there was due \$2,000 of principal and a year and six or seven months' interest. His explanation of the preparation, by his direction, of an assignment to the complainant is this: he says, some time after the execution of the assignment to him, he ascertained that the person who made the mortgage had no title on record for the mortgaged premises; that he went at once to Danser and told him he had swindled him, and that if he did not take the mortgage back he would make him. He says that Danser replied that the mortgagor's title was all right, but if he was dissatisfied he would pay him his debt, or give him another security, and he could then re-assign the mortgage. He further says that it was ultimately arranged that Danser should have two mortgages, which were then liens on his lands, canceled, and execute a mortgage thereon to him, and he was then to assign the mortgage in controversy to the complainant. He says it was after this scheme had been agreed upon that he ordered the assignment to the complainant to be drawn.

These statements present the question of fact to be decided. The counsel of the defendant, however, insists that, as a matter of law, the bill in this case must be dismissed, regardless of what the evidence demonstrates the truth to be in respect to the trust alleged, his contention being that the trust set up by the complainant is one which cannot be established except by written evidence. The trust, it will be observed, affects personal property, and not lands. The subject of it is a debt. That part of the statute of frauds which enacts that all declarations and creations of trust shall be manifested by writing and signed by the party creating the same, or else shall be void and of no effect, applies only to trusts of lands, and has no application to trusts of personal property. A valid trust of personalty may be created verbally, and proved by parol evidence. A trust of personal property, almost precisely like the one under consideration, and which had been created by mere spoken words, and was supported by only parol evidence, was upheld by Chancellor Williamson in

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Hooper v. Holmes, 3 Stock. 122; also *Kimball v. Morton*, 1 Hal. Ch. 26; *Sayre v. Fredericks*, 1 C. E. Gr. 205; *Eaton v. Cook*, 10 C. E. Gr. 55; 2 Story's Eq. Jur. § 972; 1 Perry on Trusts § 86. A valid trust of a mortgage debt may be created by parol; for, though a trust thus created cannot embrace the land held in pledge, yet it is good as to the debt, and will entitle the *cestui que trust* to sufficient of the proceeds of sale, when the land is converted into money, to pay the debt. *Sayre v. Fredericks*, *supra*; *Benbow v. Townsend*, 1 M. & K. 506; *Childs v. Jordan*, 106 Mass. 321.

It must be held, then, that the trust alleged in this case is valid, and if it has been sufficiently proved, the complainant is entitled to have it established and enforced. The question then is, has it been proved? A high degree of evidence should be required. Before the court engrafts a trust upon a written instrument, absolute on its face, it should require the most cogent proof. Such proof, I think, has been furnished in this case. The undisputed facts make a strong case against the defendant. He attempts to explain and moderate the force of the one having the greatest weight. I refer, of course, to the fact that he had an assignment drawn to the complainant, and that when he gave the order he said it was right that she should have the bond and mortgage. His attempted explanation has, however, resulted in a series of contradictions which utterly destroy his testimony.

By his answer, which is under oath, he says that after he sent his assignment to Ocean county for record, he was informed that the mortgagor had no title on record for the mortgaged premises, and that he went at once to see Danser, and that an arrangement was then made by which Danser was either to pay his debt, or substitute another security, and he was then to re-assign the mortgage. His assignment was not lodged for record until October 23d, 1875. Danser had then been dead more than a month, so that the arrangement, at the time stated, was unquestionably a fabrication. When the defendant came to testify, he swore that before he lodged his assignment for record, he had heard, from one George P. Conover, that the mortgagor had no title, and he went at once to see Danser. But it is perfectly clear, from

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the evidence, that Conover could not have given this information until long after Danser's death ; for he did not have it himself. Conover obtained his information from the mortgagor, and the mortgagor swears that he first obtained it from a search made in December, 1876. The defendant was subsequently recalled and re-examined, against the complainant's objection, and without an order for that purpose, and then swore that one Edward P. Jacobus first informed him that the mortgagor had no title, and that this information was given to him very soon after the assignment was made to him. But, upon the examination of Jacobus, it was shown that the search from which he obtained his information was not made until after Danser had been dead more than a month. So it is perfectly clear that the information which the defendant says led to his interview with Danser did not come to him until after Danser was dead, and the conclusion is therefore unavoidable that no such interview as he describes took place. The tergiversation of the defendant upon this point renders his testimony unworthy of credit. I find it impossible to believe him.

It must also be remarked that the defendant's conduct in relation to the custody of the bond and mortgage, as portrayed by himself, shows very clearly that he did not believe they were his property. He says the bond and mortgage were delivered to him, with the assignment, on the day of the date of the assignment, and that he took them to a hotel, in which he and Danser were jointly interested, and which was under the management of Danser, and threw them in a desk in the bar-room. He retained the assignment. He gave them no further care or attention, but carried the assignment to his house and placed it in his safe. He does not know when or how Danser got possession of the bond and mortgage. So far as appears, he has never tried to find out. Danser did not live in the hotel, but occupied a dwelling in the village where the hotel was located. The defendant says, that while Danser was sick, on the occasion of his last visit to him, Danser told the complainant to get the bond and mortgage and give them to him, but that she refused to do so, and, to repeat his own words, "she was just as cross to me as she could

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be." He did not ask Danser why he had taken them from the desk, nor did he insist upon their being at once surrendered. He never asked for them after Danser's death, nor did he make any attempt to obtain possession of them. Every phase of his conduct evinces a consciousness that he had no right to them, and that any attempt to take them from the possession of the complainant would be met by a resistance which he knew was grounded in right and truth. The evidence, in my opinion, fully establishes the trust alleged.

The defendant also insists that the trust upon which the complainant's action is founded should not be enforced, because it was concocted to cheat and defraud Danser's creditors. It is enough to say of this contention that no such defence is presented by the answer, and that the complainant's right to a decree cannot be defeated by a defence she has had no opportunity to meet and disprove.

There must be a decree establishing the trust and requiring the defendant to execute it. The defendant must pay costs.

CAROLINE SCHMIDT

v.

ABRAM S. OPIE and WILLIAM H. REIMER.

1. Any one liable on a contract, express or implied, though only contingently liable, is a debtor, within the meaning of the statute of frauds, from the date of his contract.

2. All that a judgment creditor need do, who seeks the aid of a court of equity against his debtor's land, is to show a judgment at law creating a lien thereon; but if he seeks aid in respect to his debtor's personal estate, he must show not only a judgment, but that an execution has been issued.

3. On an agreement for the sale of land being made, the purchaser becomes in equity, the owner of the land, and the vendor becomes the owner of the purchase-money.

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4. If a mortgagor executes a mortgage for a fraudulent purpose, and the mortgagee accepts it, with knowledge of the mortgagor's purpose, intending to aid him in such purpose, the mortgage will be held void as to those who are defrauded by it, even if it is founded on a perfect consideration.

On final hearing on bill, answers and proofs, taken before the ~~vice~~-chancellor.

Mr. Joseph P. Osborne, for complainant.

Mr. John Schomp, for defendants.

THE VICE-CHANCELLOR.

This is a foreclosure suit. No defence is made by the owner of **the** equity of redemption, but two judgment creditors of the mortgagor attack the validity of the complainant's mortgage. **They** say, first, that the mortgage is without consideration, and **should**, for that reason, be set aside; and, second, that if it is **founded** on a valid consideration, it was executed for the **purpose** of defrauding them, and is therefore void as to them. The **second** ground is the only one I shall consider.

The defendants must be considered creditors from the date of **the** contracts under which their claims arose, namely, from February 25th, 1875. The rule upon this subject, as laid down in **another** case, is this: Any one liable upon a contract, express or **implied**, though only contingently, is a debtor, within the meaning of the statute of frauds, from the date of his contract. *Post v. Stiger*, 2 Stew. Eq. 554.

The defendants were not bound to show, as preliminary to **their** right to seek the aid of this court, that executions had been **issued** upon their judgments and returned unsatisfied. All that a **judgment** creditor need do, who seeks the aid of a court of **equity** against the real estate of his debtor, is to show a **judgment** at law creating a lien on such estate. Under our statute a **judgment** is a lien on lands from its recovery. But if a creditor **wants** the aid of the court in respect to the personal estate of his debtor, he must show, not only a judgment, but that an execu-

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tion has been issued. A judgment does not bind personal estate; such property can only be reached by an execution. *Robert v. Hodges*, 1 C. E. Gr. 299.

The question of fact presented by the case is this: Was the mortgage executed with intent to defraud the defendants, and, if so, was the mortgagee a party to the fraud? The mortgage was made by one brother to another—by John Schmidt to Charles Schmidt—and bears date March 1st, 1875, but was not acknowledged until March 5th. Prior to the making of the mortgage, John Schmidt had agreed to convey the mortgaged premises to the defendant Opie, and Opie's judgment is founded on a breach of that contract. The contract bears date February 25th, 1875, and required John to make a deed to Opie on the 10th of the following month. By that contract, Opie became the owner, in equity, of the mortgaged premises. It is a fundamental rule of equity jurisprudence, that upon an agreement for the sale of land, the purchaser becomes the owner of the land, and the vendor becomes the owner of the purchase-money. The contract creates a trust. By force of it, the vendor becomes trustee of the legal estate for the vendee, and the vendee becomes trustee of the purchase-money for the vendor. If the vendor conveys the land to another, and his grantee takes title with notice of the prior contract, he will take the land subject to a trust in favor of the first purchaser, who may compel a conveyance of it. *Haughwout v. Murphy*, 7 C. E. Gr. 531.

Charles Schmidt took his mortgage with full notice of the Opie contract, and that John wanted to escape the performance of it. The complainant is the wife of John Schmidt, the mortgagor. She says that it was arranged originally that Charles was to take a mortgage on the Opie farm—by the contract, Opie was to convey a farm to John in exchange for the mortgaged premises—but when he found that Opie intended to cheat John, he demanded a mortgage on the mortgaged premises. It also appears from the complainant's evidence that John had made up his mind, on the very day he signed the contract, not to perform it. She says he told her, on his return from Somerville the day the contract was signed, that he had heard that there was another

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mortgage on the farm besides the one Opie had told him about, and that he had made up his mind not to take the farm. John says that he had told Charles, before Charles asked him to give a mortgage, that he had made a contract to convey the mortgaged premises to Opie, and that the object of his visit to Charles, when he gave him this information, was to see what he could do to satisfy Charles for what he owed him.

These facts render it perfectly clear, I think, that Charles knew, when it was arranged that the mortgage should be given, that John had agreed to convey the mortgaged premises to Opie, and that he did not mean to keep his contract. Charles also knew that the execution of the mortgage to him would put it out of John's power to perform his contract. That, undoubtedly, was the object that both intended to accomplish by the mortgage. It is practically confessed.

This rendered the mortgage an instrument of fraud, and made it utterly void against those who were defrauded by it. The fact that it was founded on a full, valuable consideration, will not save it. Such an instrument may be even more effectual as a means of fraud than a mortgage without consideration. A mortgagee, to be able to successfully resist the impeachment of his security, must appear to be not only a mortgagee for value, but a mortgagee in good faith. If it appears that his mortgagor executed the mortgage for a fraudulent purpose, and that he knew of such purpose, and took the mortgage to aid him in its execution, his mortgage is void against those who are defrauded by it, even if it is founded on a perfect consideration. *Green v. Tatum*, 4 C. E. Gr. 105; *S. C. on appeal*, 6 C. E. Gr. 364.

The conduct of the parties furnishes very important evidence, and leaves no doubt with what intent they planned the execution of this mortgage. The debt which it is alleged the mortgage was given to secure, had been standing a long time—part of it since 1865, and all of it since 1869. It had been incurred in sums of from \$25 to \$1,350. No evidence of indebtedness of any kind is shown to have been given or made. No payment of either principal or interest was ever made; and although the debtor borrowed \$1,500 on mortgage on these very premises,

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and deposited the money in a savings bank, and kept it there a long time, with the knowledge of the creditor, yet the creditor never asked for payment, nor did the debtor offer to pay. As soon as the mortgage was delivered, the mortgagee made a gift of it to the mortgagor's wife. The mortgage, though dated March 1st, 1875, was not acknowledged until March 5th. The assignment to the complainant is dated March 5th, 1875, so that it would seem the only object the mortgagee could have had in getting security for his debt was to present the security to his debtor's wife. His gift shows that he did not want security for his own protection. Why did he not give her the debt, and let her get it secured or not, as she thought proper? That, it seems, would have been the course which would have been pursued if it had not been intended that the mortgage should help the mortgagor escape the performance of his contract.

Besides, I find it very difficult to believe that this mortgage ever had any real consideration. Charles may have given John money at various times; the several sums thus given may have aggregated a large sum; but was it understood, as the moneys were advanced, that the relation of creditor and debtor existed; and were the moneys advanced with an expectation of payment, on one side, and an intention to pay, on the other? Charles was prosperous and wealthy, and without children; John had but little property and a large family. Charles took nothing to show for the money advanced, and so far as appears, he made no charge of it. His advances or gifts extended over a period of four or five years, but no payments were made, though Charles knew John had on deposit in bank the sum of \$1,500. At any time between 1869 and 1875, John could have given Charles the same security that he gave him in March, 1875; but neither party seems to have regarded the advances as a debt until John got into trouble, and then they were treated as a debt, and a mortgage was given for them, which was immediately transferred to John's wife as a gift. These facts furnish very cogent evidence to my mind that if John had not got into trouble, no mortgage would have been given and no debt claimed. The proofs convince me that Charles's object in taking the mortgage was to help

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John escape the performance of his contract with **Opie**. Their **fraud** was aimed directly at him, and he has a clear right to **redress** against it.

The mortgage must be declared void as to the defendants, **Opie** and **Reimer**, but good as to the other parties. This result **simply** affects the order in which the liens against the mortgaged premises must be paid. The mortgaged premises will be ordered to **be** sold, and the proceeds of sale must be first applied in satisfaction of the judgments of **Opie** and **Reimer**, and their costs in **this** court, and then to the payment of the complainant's mortgage.

NELSON L. BUDD

v.

JOHN A. VAN ORDEN.

1. In determining the question whether a deed, absolute on its face, is what it purports to be, or a mortgage, the fact that the parties, after the execution of the deed, still understood that the relation of creditor and debtor continued, in respect to the debt on which the deed is founded, must generally be regarded as decisive in showing that the instrument was intended to be a mortgage.

2. The only infallible test of the value of a merchantable article is what it is actually sold for at a fair sale.

3. A mortgagee in possession, holding under a deed absolute on its face, who sells the mortgaged premises, is bound to account to his mortgagor at the price at which he sold, though he may be able to show, by the opinion of competent judges, that such price is in excess of their market value.

On final hearing on bill, answer and proofs.

Mr. Joseph Coult, for complainant.

Mr. J. S. Salmon, for defendant.

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THE VICE-CHANCELLOR.

The principal object of this suit is to have a deed, absolute on its face, declared to be a mortgage. The parties are brothers-in-law. The deed, which it is sought to change to a mortgage, was made in August, 1870, and conveyed the whole of the complainant's interest in his father's estate. At the date of the deed, his father, Barney Budd, had been dead about three years. When the deed was made the complainant resided in the west, but some weeks prior to its execution had come to New Jersey to raise money on his share in his father's estate. He returned to the west very soon after the deed was executed. The first transaction between the parties, it is admitted, was a loan. The defendant agreed to loan the complainant \$500, to be secured by a mortgage on his interest in his father's estate, and a policy on his life for \$1,000. The mortgage was executed and the policy procured, and both delivered to the defendant in June, 1870. The defendant still held the mortgage at the time of the trial, but he surrendered the policy after \$128 in premiums had been paid upon it, and received, as its surrender value, the sum of \$18. The deed purports, upon its face, to have been made for a consideration of \$900. It is not disputed that this sum was handed by the defendant to the complainant, nor that \$400 of it was immediately handed back to the defendant's wife, for which she gave the complainant her note. The defendant insists that the deed was made in execution of an actual purchase, and that the \$900 passed to the complainant was passed in payment of the sum agreed upon as the purchase-money, and that the \$400 handed to his wife was a deposit he required the complainant to make, as a condition of his purchase, to answer a claim made by the executors of Barney Budd against the complainant, the amount of which was then undetermined. But the defendant admits that on the delivery of the deed it was understood that he should continue to hold the policy as security. He says the arrangement was this: that he should keep the policy alive, and if he did not succeed in selling the interest which he had purchased of the complainant for what he had paid for it, and the complainant should die, he was to have the right to retain, out of the sum

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received on the policy, the premiums he had paid, and also any loss he might have sustained on the sale of the complainant's interest, and that the balance, if any, should be paid to the complainant's family. The complainant, on the contrary, alleges that after the mortgage and policy were delivered, the defendant became apprehensive that difficulty might arise out of the claim made by the executors against the complainant, and his security in consequence might prove insufficient. He says that the defendant then suggested that a deed would give him a better security for his loan, and put him in a position where he could deal much more advantageously in arranging the claim of the executors; that he could then represent that he had purchased and paid for the complainant's interest, and thus constrain the executors to make a fair settlement. He says he yielded to this suggestion, and consented to execute a deed for the purpose of giving the defendant a more perfect security for his loan.

I think it is conclusively shown that the deed was not given or intended as an absolute conveyance, but as a security. The proof on this point furnished by the defendant's letters, is so decisive that the defendant's counsel but faintly questioned that such must be the determination of the court. The defendant, on the 2d of August, 1871, sent to the complainant a release, to be executed by him to the executors of his father's will. By Barney Budd's will, his executors were directed to convert nearly the whole of his estate into money, and divide it equally among his eleven children. In the letter accompanying this release, the defendant said :

"I have made the amount in the release to correspond with the deed, but I will make this right in our final settlement."

In a letter written to the complainant August 11th, 1871, the defendant says :

"I will not have time, before the mail closes, to give you a detailed account of the whole thing, but will try and make a plain, short statement of things as they are. And first I would say I regret that I have not kept you more fully posted, but one reason is, that when the question was asked me whether I had bought you out, I said 'Yes;' and of course had to maintain and look after that interest."

In a letter dated September 8th, 1871, he says :

"If you will fill out and send on that release, I will send the balance to make your share equal with the rest, and I will do more if I do well with the place
* * * I do not remember whether the interest runs from the time the mortgage was made, June 13th, or from the time the deed was made, August 20th; perhaps you will recollect, and can see what it amounts to."

And in a letter dated January 9th, 1872, he says :

"I answered your letter in regard to your interest in the old place. * I sometimes regret that I had anything to do with it, especially that part as it places me in rather an unenviable light. The question was asked whether I had bought the interest in good faith; I said 'Yes.' The me to get a release, which I agreed to do."

When asked to explain portions of these letters, so as their statements correspond with, or not to antagonize his contention, the defendant stood dumb before the question, saying, "I do not know what it means; I cannot explain. It is quite impossible, I think, to read these letters without being convinced that the defendant clearly understood that the plaintiff still had an interest in the "old place," and that the parties understood that the relation of debtor and creditor existed in respect to the loan. This latter fact is clearly shown by the deed. Judge v. Van Orden to be a mortgage."

Budd v. Van Orden.

ascertaining the value of a merchantable commodity are speculative, and must, to a greater or less extent, be uncertain. A sale is a demonstration of the fact, while estimates, even by the best judges, are simply matters of opinion, which, at best, are only approaches to the fact. The sale in this case, I think, conclusively settled the value of the farm as between these parties. The defendant does not pretend that he obtained an exorbitant price by illegal means. If he did, it would do him no good. He would not be heard to set up his own fraud to escape liability. He made the sale, and agreed upon such terms of payment as he was willing to accept, and took such security for the purchase-money as he thought proper. His conveyance of the complainant's interest is valid against the complainant. There is nothing in the case which will justify even a suspicion that the defendant's purchaser took title with notice of the complainant's rights. Having made a conveyance which is effectual against the complainant, in passing his rights for a certain price, I think it is clear, upon the plainest principles of justice, that he is bound to account to the complainant at the price at which he sold his interest. He occupies the position of a trustee, and cannot trade on his trust. He cannot sell at one price and account to his *cestui que trust* for a less price. Besides, there is nothing before the court which tends to show that the defendant will not be able to enforce payment of every penny of the purchase-money remaining unpaid. He took a mortgage for part. He doubtless also took the mortgagor's bond. To take such evidence of the debt secured by the mortgage is the universal practice. In the absence of direct proof to the contrary, it must be assumed that the parties to this transaction transacted their business as such business is usually done, and that the defendant acted with ordinary prudence and caution. No attempt has been made to show that the obligor of the bond is insolvent, or that the money for which it was given cannot be collected by due course of law. In this posture of affairs, I think the court is bound to assume that the bond is a valid and available instrument. That being so, the defendant is bound, as a matter of simple honesty, to pay the complainant for his interest in the farm at the rate at which he sold it. A decree in conformity to this opinion has been advised.

Skean v. Skean.

KATE SKEAN

v.

BENJAMIN F. SKEAN.

1. If a husband drives his wife away, or treats her so brutally as to compel her to flee for safety, or is so cruel and malignant towards her as to show that he means to force her from his home, though she leaves the matrimonial habitation, he, in law, deserts her.

2. But a mere failure by a husband to furnish his wife with sufficient support is not a ground of divorce, nor will he be considered a deserter if she leaves him for that cause.

3. So long as a husband shares with his wife whatever means of support he may have, the law makes it her duty to abide with him; and if she leaves him because he does not give her as much or as good as she desires, or as may be necessary, the law considers her a deserter.

On petition for divorce for desertion.

Heard on proofs taken *ex parte*, and report of Special Master Levi T. Hannum, reporting in favor of decree for petitioner.

Mr. F. Kingman, for petitioner.

THE VICE-CHANCELLOR.

This is a suit by a wife for divorce. The ground is desertion. The husband makes no defence. The desertion is alleged to have commenced May 10th, 1877. The petition was sworn to on May 15th, 1880, and filed two days afterwards. The period intervening between the time when it is alleged the desertion began and the date on which the petition was filed is three years and seven days.

The proofs, in my judgment, utterly fail to make a case against the defendant. On the contrary, I think they make a much stronger case against the petitioner than they do against her husband.

Skean v. Skean.

The parties were married in Trenton, on the 10th of October, 1875, and soon afterwards took up their residence in the city of Philadelphia, where they continued to reside together until May 10th, 1877. The defendant is a poor man; he is represented to be also idle and thriftless. The petitioner gave birth to a child in February, 1877. She says the provision made by her husband for her support and comfort, during her confinement and afterwards, was very inadequate. Whether it was the best her husband's means could provide, she does not state. After her confinement, she says, she became sick and feeble, and continued so for some time, and at last wrote to her father, informing him of her condition, who, with her mother, came to see her on the 10th of May, 1877. As this is the date when she charges that her husband began the desertion which entitles her to a divorce, it is quite proper that she should be allowed to describe what occurred, in her own way. She says:

"My parents proposed that I should return with them to Trenton; my husband made no objection, and they took me with them to Trenton, where I have remained ever since; * * * I took my child with me; my father paid the railroad fare; at the same time I removed my furniture and household articles that my father and mother had given to me; my father removed them and paid the transportation; my husband was present when I left and when the goods were removed, but made no objection."

There is certainly nothing in the occurrence here described which furnishes any evidence whatever of either a purpose, or even a desire, on the part of the husband, to desert his wife. She was feeble and sick, and her parents expressed a desire to take her to their home, where she could have a mother's care, and her husband made no objection to her going. Why should he have opposed such a thing? To have given even a reluctant consent might very well, under the circumstances, have been regarded as conjugal unkindness. His failure to object certainly does not afford the least evidence of desertion. But what did the wife's conduct indicate? What was her purpose in removing all her household effects?

She desires it understood she simply went on with no thought of desertion in her mind; but she went the .

Skean v. Skean.

manner a wife would go who had determined to leave her band forever. She removed everything she had contribute make their dwelling-place a home. Whatever may have her purpose, there can be no doubt that her conduct was strong appearance of desertion. She assigns no cause for extraordinary course, nor does she attempt to justify or explain it. What seems to me still more decisive is the fact that she never returned to her husband.

But he went to see her. The petitioner says the next day after she went to her father's house, her husband came there to see her, and remained about two hours; that she saw him in the back parlor, in the presence of her father and her mother, but that he did not ask her to leave them and go with him. The first visit was made in the evening. It does not appear that either wife or parents invited the defendant to spend the night with the petitioner. The defendant made a second visit a few days afterwards. The petitioner says she saw him on this occasion in the same room; that he did not ask her to go with him, but she told him that whenever he was ready to provide her with a home, even if it was only two rooms, she was ready to go with him. She says he made no reply. The parties did not meet again so far as the evidence shows, until September, 1877. The defendant then went to his father-in-law's house, in company with a police officer. The petitioner gives the following description of that visit:

"My mother met them at the door, then called me; when I went to the door, my husband did not speak, but the officer asked if I was this man's wife. I said I was; the officer then said, 'He wishes to see you;' I said, 'Very well, I am here;' my husband did not look up or speak to me; I then told the officer why I was at my father's—that my husband had not provided for me when I lived with him, and my father had brought me home because I was sick and had nothing to eat; the officer then said, 'Well, that is a difficult story;' they then went away; my husband did not contradict anything I said. I do not know why my husband brought an officer with him; they did not disclose any reason for this singular visit."

The petitioner does not seem, at the time, to have been particularly curious or inquisitive about the matter; she asked neither

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officer nor her husband why the officer was there, nor what was the object of their visit.

This is the petitioner's whole case. As already remarked, the evidence utterly fails to make a case of desertion. I believe, moreover, the court has not the whole truth. I believe it is impossible for any one at all acquainted with human conduct to read the petitioner's evidence without seeing quite plainly that the descriptions given of what occurred when she left her husband, and also of what occurred on the occasions of his visits, are very incomplete and imperfect. She may have intended to tell everything, but if such was her purpose, it is apparent she remembered but little besides what she understood to be her wrongs. But if we take her testimony as presenting the whole truth, her case is merely this: She left her husband and went to her father's house, because her husband did not furnish her with sufficient food and proper care. It does not appear that he did not do for her the best he could, or that he refused to share with her such means of support as he had. He failed to support her, and she left him. He did not refuse to allow her to share with him in whatever he had. Her separation from him, for this cause, was not a desertion by him. It is true, it is not always the one who leaves the matrimonial habitation that is the deserter. The husband may drive his wife away, or he may treat her so brutally as to compel her to flee for safety, or his conduct may be so cruel and malignant as to show that he means to force her away. If a wife, for either of these causes, separates herself from her husband, and he allows her to remain away for the statutory period, without professing sorrow for his violations of conjugal duty, and promising to amend his conduct, and asking her to return, he, in the eye of the law, is the deserter, and she has a right to ask for a dissolution of the marriage tie. But a mere failure by a husband to furnish his wife a sufficient support is not a ground of divorce; nor will he be considered a deserter if she leaves him for that cause. So long as he shares with her whatever means of support he may have, the law makes it her duty to abide with him; if she leaves him because he cannot give her as much or as good as she desires or as may be

Johnson v. Somerville.

necessary, she is the deserter, and not he. The law upon this subject is settled. Chancellor Zabriskie in *Palmer v. Palmer*, 7 C. E. Gr. 88, said :

“There is no rule that makes want of sufficient support by a husband, or total want of support, a desertion of his wife. It is no cause for divorce, and the court cannot, by construction, convert it into a ground of divorce by calling it desertion. * * * By marriage, a wife agrees to share the fortunes of her husband, in poverty and sickness, as well as in affluence and health. She may be obliged to aid him in her own support, and still be bound to adhere to him. And she is not, because he is poor and her lot uncomfortable, justified in leaving him and betaking herself to the luxuries of the home of her father. Much less can she convert an unwarranted abandonment of her husband into a desertion by him.”

The same doctrine was enunciated in *Laing v. Laing*, 6 C. E. Gr. 248.

The petition must be dismissed.

This case was decided some time ago, by a simple statement that the proofs did not establish a case of desertion. Counsel thereupon requested to be informed of the reasons for this conclusion, in order that he might determine what course it was proper for him to pursue. This opinion presents the reasons upon which the judgment of the court rests.

THEODORE JOHNSON et al.

v.

THE BOARD OF COMMISSIONERS OF SOMERVILLE.

1. Great delay in seeking relief is a good bar to a suit for specific performance.
2. Sixty years' delay constitutes a bar.
3. A suitor asking a court of equity to give him the benefit of the exercise of its discretionary power, must show a good conscience, good faith, and reasonable diligence.

On demurrer.

Johnson v. Somerville.

Mr. James J. Bergen, for demurrant.

Mr. S. B. Ransom, for complainants.

THE VICE-CHANCELLOR.

This case may be decided by the application of a familiar rule. The bill asks for specific performance of a contract to convey lands, made June 14th, 1809, and which, by its terms, was to be performed on or before the 1st of April, 1810. This suit was commenced December 23d, 1873, over sixty-four years after the contract was made, and over sixty-three years after breach, if any ever occurred. The complainants claim as devisees of the vendee. He died March 12th, 1828, and the vendor died September 6th, 1830, so that the complainants slept upon their rights over forty-five years after they had a right to sue. Their ancestor had previously slept for a period of nearly eighteen years.

The remedy by specific performance is discretionary. The question in such cases is not what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice. *Plummer v. Keppler*, 11 C. E. Gr. 482.

Great delay in seeking relief is a good bar to any suit in equity. It is very difficult, in most cases, to get full and trustworthy evidence respecting a disputed transaction which occurred twenty years before it is brought under judicial investigation, and in a case where sixty years have elapsed it would be a marvel if it were not entirely impossible.

With regard to delay in seeking this particular remedy, Lord Alvanley has said: "A party cannot call upon a court of equity for specific performance unless he has shown himself ready, desirous, prompt and eager." *Milward v. Earl of Thanet*, 5 Ves. 720, note b. Lord Cranworth has given expression to the same opinion: "Specific performance is relief which this court will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit." *Eads v. Williams*, 4 De G. M. & G. 691. In *Van Doren v. Robinson*, 1 C. E. Gr. 263, Chancellor Green said: "Great delay, unaccounted for, is a bar to a claim for specific performance." Lord Camden, at an early day,

JAMES S. MORTON.

stated the general doctrine as follows: "A court of equity, w
is never active in relief against a bar of public convenience
has always refused its aid to stale demands where the party
slept upon his rights & acquiesced for a great length of
Nothing can call forth this court into activity but consci
good faith and reasonable diligence. Where these are want
the court is passive and does nothing: laches and neglect
always disbar a claimant who and therefore, from the beginning
this jurisdiction, there was a *de facto* limitation of suit in this co
Smith v. C. & B. C. C. & Co. The doctrine as
stated was entered in a case strongly analogous to the or
land, by the supreme court of the United States. *Pitt v.*
the P. & P. Co.

But little need be said in demonstration of the applicatio
these principles to the case under consideration. More
seventy years have elapsed since the right of action accrued.
of the contracting parties have been dead over fifty years.
almost certain that every adult person who knew anything a
the contract at the time it was to be performed is also d
Even those who were just old enough, at that time, to
capacity to comprehend a business transaction, are now,
probably, either dead or so enfeebled in mind and body as t
unfit to give evidence. Whether this be so or not, it is ce
that much valuable and material evidence has been swept
by the great lapse of time, and thus the court has been depri
by the laches of the complainants, of the means of ascertai
the truth, and, consequently, of doing justice. It is no inju
to a suitor to deny him a hearing when it appears that, by
own laches, he has rendered it impossible for the court to do
justice to both parties.

The claim made in this case is exceptionally stale. I can
no instance in which one so remarkable for its antiquity has
before been presented for judicial approval, and I think it sho
for that reason alone, be held to be barred.

The demurrer must be sustained, with costs.

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attended, is void, first, because it is in fact, though not in form, the deed of a corporation that had no authority to make it, for the purpose for which it was made; and second, because it is an instrument, by which the officers of the corporation, in whose behalf it was made, have attempted to effect a misappropriation of its assets in fraud of the rights of the creditors. The leading facts are almost entirely free from doubt or dispute. The mortgage bears date February 26th, 1874, and was made by Willie A. Tenney to the complainants. Just prior to its date the complainants were the owners of first mortgage bonds of the Chicago, Danville and Vincennes Railroad Company, to the amount of \$298,000, upon which default in the payment of interest, due October 1st, 1873, had been made. The officers of the railroad company, for the purpose of maintaining themselves in the control of the road, put on foot a scheme by which they hoped to get the bondholders to consent to accept new obligations for the interest in arrear. The complainants opposed the scheme with such effect that the officers of the railroad company deemed it advisable to purchase their bonds. They agreed to pay \$253,300 for them, in four instalments, with an interval of six months between each payment. The mortgage in suit was given as collateral security for the payment of these instalments. The railroad company paid no money on account of the purchase, and no other security was given, except that the complainants were to retain the bonds until they were paid for. At the time the bonds were purchased, the mortgaged premises belonged to the Silver Spring Paper Company, and constituted nearly the whole of its assets. The stock of the paper company at this time was owned wholly by Amos Tenney and William D. Judson, and their wives and children, and these two gentlemen were prominent officers in both corporations, Mr. Tenney being the president and treasurer, and Mr. Judson a director of the paper company, and Mr. Judson being the president, and Mr. Tenney a director of the railroad company. By the terms of the contract of sale, the railroad company agreed to procure the paper company to execute a mortgage to the complainants for \$50,000, as collateral security for the payment of the price of the bonds, and the paper

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company, afterwards, adopted a resolution authorizing the execution of such mortgage to the complainants. This resolution was subsequently rescinded, and another passed authorizing a conveyance of the mortgaged premises to William D. Judson, ostensibly in fulfilment of a contract of sale, for a consideration of \$150,000, which, the resolution stated, was to be paid or satisfactorily secured. This resolution was adopted January 27th, 1874. On this last date, a substitute was adopted directing a conveyance to be made to Willie A. Tenney, apparently in execution of a contract of sale. About the date of the adoption of this last resolution, the stockholders of the paper company executed a paper to the complainants, assenting to the conveyance to be made to Tenney, acknowledging the receipt, by the paper company, of the full consideration to be paid by Tenney, and releasing the complainants from all obligation to see to the payment securing an application of the purchase-money. Under this last resolution, the mortgaged premises were conveyed by the paper company to Willie A. Tenney, who, immediately on receiving title, executed the mortgage in suit to the complainants, and two days afterwards reconveyed the mortgaged premises to the paper company, subject to the mortgage. The mortgage conforms in its terms to the requirements of the contract of sale of the bonds, made by the complainants with the railroad company. The arrangement between Tenney and the complainants provides, in express terms, that he should incur no personal liability by the execution of the mortgage. No contract of sale ever existed between the paper company and Tenney. The whole arrangement, so far as they were concerned, was a mere artifice, devised to throw around the execution of the mortgage a very thin appearance of legality. The assets of the paper company, at this time, were worth, according to the estimate of the complainants, about \$90,000—other estimates put them at a much lower figure—and its liabilities amounted to about \$35,000, some of which are still outstanding and unpaid. If the complainants' estimate is accepted as correct, and the mortgage is regarded as a valid instrument, it is quite clear that the execution of the mortgage plunged the paper company into a state of hopeless insolvency. It was im-

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possible to abstract \$50,000 from its available means, leaving it but \$40,000 to pay its debts and to foster its business, at a time when almost all kinds of property were rapidly declining in value, without producing that result. The railroad company having failed to pay the first instalment falling due under their contract in the purchase of the bonds, this suit was brought to compel the payment of the mortgage.

Both the complainants and the paper company are corporations created under the laws of the state of New York. Since the commencement of this suit, this court appointed the defendant Miller receiver of the paper company, upon a petition by certain of its creditors, representing that all its property was located in this state, that it had suspended its business and become insolvent, and that a receiver had been duly appointed in New York for the purpose of winding it up and making an equal distribution of its property. He was subsequently admitted, on order, as a defendant, and allowed to answer. The questions in dispute arise mainly on his answer.

The complainants deny the receiver's right or capacity to assail the validity of their mortgage, their contention being that he simply represents the corporation, and must therefore take its property subject to all such charges as the corporation itself would not be permitted to gainsay. This contention, it will be observed, assumes that the mortgage is valid against the corporation. Without expressing any opinion upon that question now, I must say that I do not think it is true, either as a matter of fact or law, that the receiver represents only the corporation. He is not created by the corporation, nor does he derive his power or his title from it, but he is brought into existence by the same authority that gave life to the corporation. He is invested with title by the act of the law. He is a creation of the law for the protection of the rights of creditors, and must necessarily be clothed with their attributes and equities to accomplish the purpose of his creation. He represents both the corporation and its creditors, and is invested with the rights and powers of both, so far as may be necessary to perform his functions.

Independent of statutory provision, and simply as a matter of

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comity, this court will extend its aid to the receiver of a foreign corporation, for the purpose of enabling him to get the possession of property which should, in equity, be applied in payment of its debts. *Bidlack v. Mason*, 11 C. E. Gr. 230. In that case, a receiver, appointed under the laws of New York, filed a bill, in this court, asking to have a judgment recovered in the supreme court of this state against the corporation which he represented, and a sheriff's sale made under it, set aside, on the ground that the judgment was fraudulent, and had been used to put the property of the corporation beyond the reach of its honest creditors. A receiver was appointed to take possession of the property and hold it during the litigation. By express provision, foreign corporations, doing business in this state, are made subject to all the provisions of our statute concerning corporations, so far as the same can be applied to foreign corporations. *Rev. 196 § 103*. The design of this enactment seems to me to be very plain. The legislative design was, unquestionably, to confer upon this court the same powers, in respect to insolvent corporations, created by foreign jurisdictions, having property in this state, that it exercised over insolvent domestic corporations, so far, at least, as the exercise of such powers was necessary to the recovery of any assets, whether legal or equitable, which should go in discharge of debts. Under this statute, I think this court may appoint a receiver auxiliary to the proceeding instituted against a foreign corporation, in the state which created it, and may properly invest him with the same powers, so far as they are necessary to the collection and recovery of its assets, that it is authorized to grant to the receiver of a domestic corporation. And I think it is bound, not only in virtue of this statute, but by the principles of a just comity, to extend to him the same remedies and rules of judgment, in the recovery of the assets of the corporation, that it would give to the receiver of a domestic corporation.

The order of appointment in this case invests the defendant with the full measure of power authorized by the statute. He is given full power and authority to demand, sue for, collect, receive and take into his possession all rights, credits and property of every description, belonging to the corporation at the time of its

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insolvency. Under a much less comprehensive grant it has been decided by the court of errors and appeals that a receiver appointed under the statute providing a method for the discovery of property belonging to a judgment-debtor, has capacity to maintain a suit in equity to annul a sale of personal property made in fraud of creditors, or to remove fraudulent liens placed thereon. *Miller v. Mackenzie*, 2 Stew. Eq. 291. There can be no doubt, under the rule established by this adjudication, that it would be competent for the receiver in this case, in his official character, to bring a suit in equity to nullify the mortgage in question. He holds the title to the mortgaged premises; he alone has a right to their possession, and he alone can sell and convey them. Adopting an argument very forcibly put in the case just cited, we may say it cannot be pretended, if the mortgagees were in possession, that this receiver could not maintain an action of ejectment against them, and if he established the fact that the mortgage was a fraud upon creditors, that he would not be entitled to recover. Why, if this be so, is he to be confined to such action, and to be excluded from taking his case before a tribunal that is competent not only to adjudge with regard to his right to the property, but also to remove from it a fraudulent and pretended claim, which, so long as it exists, renders it unsalable in his hands? His right of action and his right of defence are, in this instance, in my apprehension, reciprocal, and if he has produced sufficient evidence of the invalidity of the mortgage to entitle him, if he were complainant, to a decree so adjudging, he is, upon the same evidence, entitled to a decree of dismissal. Where it appears that a corporation is attempting, by suit, to enforce a contract which it had no power to make, and the contract, for that reason, is void, the defendant may avail himself of this defence by answer. *Trenton Mutual Life & Fire Ins. Co. v. McKelway*, 1 Beas. 133.

In my judgment, the receiver stands before the court invested with the rights and equities of the creditors of the paper company, and has therefore a right to ask judgment against this mortgage, if he has shown that it was executed in fraud of their rights.

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This brings us to the question, is this mortgage a valid instrument against the creditors of the paper company? And the creditors here meant are those whose claims accrued subsequent to the execution of the mortgage as well as those whose claims existed at its date. The paper company was formed to manufacture paper, and to vend and sell the same. No other purpose or object is expressed in its certificate of incorporation. Prior to the execution of the mortgage, it had no business relation, connection or transaction with the railroad company or the complainants. A foreign corporation, owning lands in this state, may, under our statute, convey or mortgage them. *Rev. 195 § 99.* The conveyance by the paper company to Tenney was, in everything but its form, a mortgage. The title was put in him merely to enable him to do what the paper company wanted to do itself, but what it could not do itself without having the papers display upon their face the rank illegality of the transaction. The conveyance to him was an artifice invented to hide the real nature of the transaction. The complainants, if not participants in the invention of this crooked scheme, accepted their mortgage with full knowledge of it. The evidence on this point is conclusive. It is found, first, in the original contract, which provided that the paper company should execute a mortgage directly to the complainants; second, in the terms of the mortgage itself—for if the complainants had for one moment supposed that Tenney was an actual purchaser, and had, in good faith, agreed to pay \$150,000 for the mortgaged premises, it cannot be believed that they would, without consideration, have relieved him from all personal liability for the mortgage debt. Why should they? In that case he would have been bound, in law and honor, to pay the whole of the purchase-money, and they could have had no possible motive or reason for relieving him, gratuitously, from any part of his obligation. But if they understood that he was used simply as an instrument in a scheme to accomplish, by indirection, what the paper company could not do directly, then it is easy to understand their conduct. And, third, in the fact that the complainants accepted an assent, executed to themselves by the stockholders of the paper company,

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assenting to the conveyance to Tenney, and releasing the plainants from all obligation to see to the payment or apportionment of the purchase-money. It is impossible to misunderstand the meaning of these facts, or to misinterpret their force.

The validity of this mortgage is indefensible except on the theory that it was within the scope of the powers of the company to donate the half or the whole of its property to a railroad company, regardless of the rights of its creditors and the public. It is clear it possessed no such power, and if it had attempted to do so, by open and direct means, its act would have been so conspicuously *ultra vires* as to strip it of the least appearance of validity. It is a cardinal rule of the law of corporations that a corporation created by statute can exercise no powers and has no rights, except such as are expressly given or necessarily implied. *Huntington v. Savings Bank*, 96 U. S. 473; *Grant on Corp.* 13; *Ang. & Ames on Corp.* § 111; *Grant on Corp.* 29. This rule, for a long time, has formed part of our statutory system. *R. S.* 136 § 3; *Rev.* 177 § 3; *The Mutual Life & Fire Ins. Co. v. McKelway*, 1 Beas. 133. Can the powers of a corporation be in the slightest degree enlarged or extended by the assent of its stockholders, or by any action they may take. In *Black v. Delaware and Raritan Canal Co.*, 9 C. E. Gr. 455, the court of errors and appeals affirmed that no majority of stockholders, however large, has a right to divert one cent of the joint capital to any purpose not consistent with and growing out of the original fundamental purpose of the corporation. And the supreme court of the United States has recently declared, following a judgment of the house of lords in which the present lord chancellor (Selborne) and the late lord chancellor (Cairns), and Lords Chelmsford, Hatherly and O'Hagan concurred, that the broad doctrine is now established that a contract, not within the scope of the powers conferred on a corporation, cannot be made valid by the consent of every one of its shareholders, nor can it, by any partial performance, become the foundation of a right of action. *Thomas v. West Jersey Gas Co.*, 101 U. S. 71. While it must be admitted that this doctrine has not received the sanction of every ex-

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judge who has been called upon to enforce it, yet I think it is now vouched for by such august authority, and is so manifestly supported by sound reason and the highest considerations of policy, that it must hereafter be accepted, universally, as expressing the true rule of judgment in such cases.

I am of opinion that it was not within the scope of the powers of the paper company to donate the half of its property, or to do what was practically the same thing, to make a gratuitous pledge of its property for the debt of another corporation. Nor do I think it could do by indirection what it was incompetent to do directly.

There is another important principle which I think it is my duty to enforce in deciding this case. Equity regards the property of a corporation as a fund held in trust for the payment of its debts, and if others than *bona fide* creditors of the corporation, or purchasers, possess themselves of it, they take it charged with this trust, which a court of equity will enforce against them. This is now a well-recognized rule of equity jurisprudence, and the courts of no state have enforced it with more firmness than those of the state which gave corporate entity to both of these corporations. *Bartlett v. Drew*, 57 N. Y. 587; *Lawrence v. Nelson*, 21 N. Y. 158; *McLaren v. Pennington*, 1 Paige 102; *Nathan v. Whitlock*, 3 Edw. Ch. 215; *S. C. on appeal*, 9 Paige 152; *Curran v. State of Arkansas*, 15 How. 304; *Wood v. Dummer*, 3 Mason 308; *Sawyer v. Hoag*, 17 Wall. 610; *Field on Corp.* § 403.

The same principle, in a more amplified form, was promulgated by Chancellor Williamson, in *Redmond v. Dickerson*, 1 Stock. 507. In that case one of the directors of a corporation had purchased certain machinery for it at one price, and afterwards charged it to the corporation at an advance of \$10,000. This charge was made with the consent of the other directors, who, with the director who made the purchase, held all the stock of the corporation. The chancellor was convinced that the \$10,000 had been divided among all the directors. The validity of this remarkable transaction was attempted to be defended on the ground that nobody was harmed by it; that inasmuch as the

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directors owned all the stock, and they consented, no one else had sufficient interest to entitle them to be heard. But the chancellor very pertinently asked :

“Were not the public interested? Why did the charter require a certain amount of money to be paid in as capital, upon which the company were to do business? Was it not for the protection of the public, with whom the company were to obtain credit and to deal? * * * Did it make no difference, though these directors were the sole stockholders, whether the capital was improvidently diminished or safely guarded and preserved as a fund for the future operations of the company? Was it not a breach of trust for the directors so to speculate on the capital, for their individual benefit, as to lessen the security which the legislature intended to provide for the protection of their dealers and the business community? The directors of a corporation cannot speculate with its funds or its credit, and take to themselves the profits of their ventures. Even if they are the only persons interested as stockholders, still they have no right to do so, for such transactions are opposed to the policy of the law, and cannot, in any manner, be countenanced in a court of equity.”

No argument is necessary to apply these views to the case in hand, nor to show the pertinency of the principle above adverted to. The complainants are in no sense *bona fide* creditors or purchasers of the paper company. They reached their present position by a very devious path. They took their mortgage with full knowledge that, as against creditors, its execution was an insidious attempt to divert the property of the paper company from its legitimate uses. Indeed, I think it would be difficult to imagine a transaction more subversive of everything like safety and security in the management and use of corporate property than the one brought in judgment here.

Whether the assent of the stockholders to the conveyance to Tenney will conclude them in case more money should be realized from the sale of the mortgaged premises than shall be sufficient to pay the debts of the paper company, does not fall within the province of this court to consider or decide. So far as now appears, no citizen of this state is interested as a creditor. This court is therefore only required to exert an auxiliary jurisdiction. It is only required to put its power in motion, so far as may be necessary to put the property of the corporation, located in this state, in such form that it can be readily and conveniently administered, and, after that is done, to transmit it to the proper

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officer, appointed by the courts of the state of New York, to be there administered and distributed according to law.

I am of opinion that the mortgage sued on is without force or validity against the receiver. The bill must, therefore, be dismissed, with costs.

SAMUEL B. REDMAN

v.

THE PHILADELPHIA, MARLTON AND MEDFORD RAILROAD
COMPANY.

That section of the general railroad law which authorizes a railroad corporation to enter on lands and begin constructing their road, after paying into the circuit court of the county where the lands lie, the amount awarded, pending their appeal from such award, is unconstitutional in that compensation, or a tender thereof to the land-owner, does not precede the use and occupation of his lands; and for want of such tender he may enjoin the company from entering upon his lands and constructing their road thereon.

On motion for injunction. Heard on bill and order to show cause, no answer being made.

Mr. S. H. Grey, for complainant.

Mr. Peter L. Voorhees, for defendants.

THE VICE-CHANCELLOR.

The defendants are a railroad corporation, organized under the general railroad law, for the purpose of constructing a railroad from Haddonfield, in the county of Camden, to Medford, in the county of Burlington. The complainant owns a farm in the county of Camden, situated on the line of the projected road. Being unable to agree with him for the purchase of a right of way through the farm, the defendants procured commissioners to be appointed to appraise the value of his land and assess his damages. The commissioners' report awards him \$2,544. The defendants have appealed. They have not paid the complainant

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the sum awarded, nor tendered or offered to pay it, but paid it into the circuit court of the county of Camden, under order directing that it shall remain there to abide the result of the appeal or the further order of the court. In this post-trial affairs, the defendants took possession of the complainant's lands in spite of his resistance, and are now proceeding with the work of constructing their road thereon. He now appeals to the court to protect him in the enjoyment of his property, and that compensation shall be made to him for it. He has always been willing to accept the sum awarded by the commissioner, and to allow the defendants to take the lands condemned.

If the defendants' appropriation of the complainant's lands constitutes a taking of private property by a private corporation without compensation first made to the owner, there can be no doubt that it is the duty of the court to give to the complainant the protection he seeks. *Browning v. Camden and Woodbury R. R. Co.*, 3 Gr. Ch. 47; *Jersey City and Bergen R. R. Co. v. Jersey City and Hoboken H. R. R. Co.*, 5 C. E. Gr. 101; *Mettler v. Easton and Amboy R. R. Co.*, 10 C. E. Gr. 101; *Morris and Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 10 C. E. Gr. 101.

The defendants claim that their act in appropriating the complainant's lands, under the circumstances stated, was authorized by law. Their warrant is found in the last clause of the twelfth section of the general railroad law, which provides that in case any company incorporated under this act shall appeal from the finding of the commissioners appointed to appraise and assess, then the said company shall, on payment of the amount so assessed or found into the circuit court of the county where the lands taken lie, be empowered to enter upon and take possession of said lands, and proceed with the work of constructing its road. *Rev. 929 § 101*. This clause did not form part of the original act (*P. L. of 1873 p. 88*), but was added by amendment. *P. L. of 1877 p. 192*. The twelfth section of the act provides that after the report of the commissioners shall have been filed in the office of the clerk of the county where the lands taken lie, and on payment or tender of the amount awarded, as thereafter provided, the corporation shall be

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powered to enter upon and take possession of the lands condemned. *Rev. 928 § 100*. The directions of the two sections just referred to upon this subject, stood, in the original act, in exact harmony. The twelfth directed that on payment or tender of the sum awarded, the corporation should have the right of appropriation; while the thirteenth provided that in case a tender was made, and the land-owner refused to accept, the money should be paid into court, and thereupon the corporation should be empowered to take possession.

There can be no doubt that if the law stood now in its original form, the act of the defendants would be without legal warrant. Under the original act, except they paid the sum awarded, or made a tender of it, they acquired no right. The introduction of the new clause, by amendment, shows conclusively, I think, that the legislature intended thereby to prescribe a new and different rule from that prescribed by the original act. Any attempt, therefore, to read the new provision so as to make it harmonize with the old and express the same idea must, I think, prove futile. The new enactment, as I understand it, says plainly that if the corporation appeal from the finding of the commissioners, they shall be authorized, on paying the money into court, and without making payment or tender to the land-owner, though he is known and of full capacity, and his title is unquestioned, to appropriate his lands.

Is this enactment a law—in other words, is it within the scope of the powers conferred by the constitution upon the legislature? Under every form of government, private property may be taken for public use. The constitution of this state imposes two important restrictions upon the exercise of this power. The first is found in the bill of rights, and ordains that “private property shall not be taken for public use without just compensation;” and the second is found in that part of the constitution which limits the power of the legislature. It ordains that “individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners.” The first was intended to regulate the right of the state, whether the power is exercised by the state

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for its own purposes, or by a municipal corporation for its purposes, under the authority of the state; and the second was intended to limit the power of the legislature in granting the right to such bodies as the defendants. It is the last regulation which must govern my action in this case. Its meaning, to my mind, is perfectly obvious; indeed, it is its own expositor. Whether this is the case, reasoning and illustration have no office. What is already perfectly clear and plain cannot be made more so by any process of demonstration. As a general rule, any attempt in that direction is more likely to obscure than elucidate. The provision under consideration plainly ordains that compensation shall precede appropriation; and if the legislature, in this emergency, have not observed this direction, they have transgressed their power.

Such, I think, has been the uniform construction given to this clause by both the legislative and judicial departments of the government. I think it will be very difficult to find a single instance before the present, where the legislature, since the adoption of the present constitution, have granted to a private corporation the power to exercise the right of eminent domain, except on the condition that payment or tender of compensation should precede appropriation, if the person entitled to it was known of full capacity, and his title was free and unquestioned. There may be such instances; but if they exist, it is certain the power thus granted has never been exercised in defiance of the will of the land-owner. Under charters containing the condition all so mentioned, the courts of this state have repeatedly held that a corporation acquired no right to appropriate the lands until compensation was first made, either by payment or tender. *State v. Camden and Atlantic R. R. Co.*, 4 Zab. 592, 598; *Meller v. Easton and Amboy R. R. Co.*, 8 Vr. 222; *Morris and Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 10 C. E. Gr. 384; *Mettle v. Easton and Amboy R. R. Co.*, *Id.* 214. Tender, if the money is refused, is regarded as equivalent to payment. *Dougherty v. Somerville and Easton R. R. Co.*, 1 Zab. 442; *Mercer v. Somerset R. R. Co. v. Delaware and Bound Brook R. R. Co.*, 11 C. E. Gr. 464. Compensation is not made in fact in

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case, because the person entitled to it will not accept it. But it is in law. It is his fault that it is not made in fact, and he cannot therefore be heard to urge his own wrong for the purpose of defeating the right of the corporation.

Chancellor Halsted, in *Doughty v. Somerville and Easton R. R. Co.*, 3 Hal. Ch. 51, held distinctly that if the charter under consideration in that case authorized the railroad company to take possession of the complainant's lands, without first making compensation, either by payment of the sum awarded by the commissioners or making tender of it, it was, in that respect, unconstitutional and void. Mr. Justice Depue, in *Loweree v. Newark*, 9 Vr. 151, in defining the difference as to the time when compensation must be made, under the two clauses of the constitution above quoted, said where private property is taken by the state, or by a municipal corporation by authority of the state, compensation need not precede actual appropriation; but where it is taken by individuals or a private corporation, by the exercise of the right of eminent domain, there compensation must precede occupancy. These utterances merely reiterate what the constitution declares with the utmost plainness and simplicity.

I do not think the validity of this enactment can be vindicated, on the ground that the power of the legislature to define what shall be considered making compensation under this clause, is without restriction, and that it is therefore competent for it to declare that the payment of the money into court, or to any other agency of government, or to an indifferent, responsible third person, shall be considered a compliance with this provision of the constitution. Such an interpretation seems to me much more like an evasion than even a subtle construction. The command of the constitution is that compensation *shall be made to the owner*; that is, that the money shall become his, and that he shall have the same dominion over it that he had over the land before it became the property of the corporation, and not that the money shall be made secure to him, or that it shall be placed in the custody of the law or impounded for his benefit. The manifest purpose of the framers of the constitution was not

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to give the parties reciprocal or concurrent rights, but to give precedence and superiority to that of the land-owner. They meant that until he had his compensation in his hand, provided he was willing to accept it, the corporation should acquire no right to the possession of his land. This enactment, if enforced, will subvert that purpose, and it is therefore, in my judgment, without constitutional warrant and void.

I am fully aware of the gravity of the question submitted for judgment, and that the conclusion I have reached is one that should not be formed without very careful deliberation. But I am so thoroughly persuaded, by full reflection and careful examination, that this enactment transcends the power committed to the legislature by the constitution, that I cannot hesitate to say so.

An injunction must go, prohibiting the defendants from appropriating the lands condemned, until they shall have first paid the compensation awarded by the commissioners, or such other as may be found by a jury.

MARGARET FOLEY et al.

v.

EDWIN R. KIRK.

1. To compel the surrender and cancellation of written instruments, which have spent their force and are mere nullities, but which, left in an uncanceled state, may becloud a title, or be used for dishonest purposes, is an ancient and well-established head of equity jurisprudence. A court of equity will assume jurisdiction and compel the surrender of the instrument, or limit its use to such purposes as may seem to it to be equitable, when a suit at law is already pending, if it shall appear that it is doubtful whether the instrument may not be used, in such suit, for a dishonest or inequitable purpose.

2. The question whether a deed was intended, by the parties thereto, to operate as a mortgage or as an absolute conveyance, is one that a common law court can neither hear nor determine. It is a question belonging exclusively to equity tribunals, and over which common law tribunals have no jurisdiction whatever.

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3. It is a universal principle that a purchase, at a tax sale by one whose duty it was to pay the taxes, shall operate only as an extinguishment of the tax. One man can acquire no rights against another by a neglect of a duty which he owes to the other.

4. Where a party, lawfully in the possession of land, under a title which turns out to be defective, makes permanent improvements, in good faith, before he has notice that his title is defective, which materially increases the value of the inheritance, and the actual owner afterwards seeks relief against him in equity, relief will not be given except upon equitable terms.

On final hearing on bill, answer and proofs taken before a master.

Mr. Charles H. Winfield and Mr. Peter Bentley, for complainants.

Mr. Joseph D. Bedle, for defendant.

THE VICE-CHANCELLOR.

The principal object of the bill in this case is to compel the defendant to surrender, for cancellation, five declarations of sale, which the complainants allege were, long ago, fully paid, and are, consequently without legal force, but which they say the defendant intends, wrongfully, to put in evidence against them on the trial of an action of ejectment, which they have brought against him, and that their production in evidence will very seriously imperil their just rights.

The facts material to the controversy, which are either admitted or so fully proved as to be beyond dispute, may be stated as follows:

Ann Stanton died intestate, in 1843, seized in fee of two lots of land situate in the city of Hoboken. She died without leaving issue, but leaving a husband, and two brothers and a sister. A child was born to her and her husband, which died in infancy, so that, on her death, her lands descended to her two brothers and her sister, subject to an estate by the curtesy in her husband. Her husband, John Stanton, conveyed the lands of which she died seized to his brother, William Stanton, by deed dated July 15th, 1846. William Stanton, after he acquired John's life

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estate, neglected to pay a tax of \$14.93, assessed against one of lots for the year 1858, and on the 16th of May, 1859, the proper municipal authority sold this lot to one Ebenezer Montague, for the amount of the tax and costs, for the term of nine hundred years, and issued a declaration of sale. The same lot was again sold, to the same purchaser, for a term of ninety-nine years, on the 30th day of April, 1860, for the tax of the year 1859, and also for a sewer assessment of \$64.23. Declarations of sale, in execution of these sales, were also issued. On the same day the other lot was sold, to the same purchaser, for a term of ninety-nine years, for the tax of 1859, and likewise for a sewer assessment of \$66.43. Declarations of sale were also issued upon these sales. The total amount of the taxes and assessments for which these sales were made, was \$180.42.

Some time in the year 1861, William Stanton applied to one Henry Thomas, who resided at Utica, in the state of New York, to make him a loan for the purpose of enabling him to pay off or purchase Montague's claims under the tax sales. Thomas consented to do so, and afterwards paid Montague \$300 in satisfaction of his claim. The amount so paid to Montague was negotiated wholly by Thomas and Montague. Stanton took no part in it, nor was he consulted about it. Prior to this time, Thomas had paid Stanton's debts, advancing a considerable sum for that purpose. Immediately after the sum to be paid to Montague was agreed on, Stanton requested Thomas to accept a mortgage for the whole of his indebtedness to him, including not only his payment to Montague, but also his payments to others. This Thomas declined to do, but insisted on having an absolute conveyance, "so," to quote Thomas's own words, "that I could see that the taxes, the interest, and so on, were paid in the future, but I told him I would give him any kind of a paper that could be drawn, to secure him the property back." Stanton assented to this arrangement, and in execution of it, on the 21st day of January, 1862, conveyed the lots in question to Thomas, by deed absolute on its face; and Thomas, on the same day, executed an agreement, under seal, agreeing to reconvey the lots to Stanton or to his wife, or to any other person he might name, on being

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paid his debt. The agreement provided that Stanton should **retain** possession of the lots and take their rents and issues, and **pay** all taxes, assessments and water rents, and that the interest **on** his debt to Thomas should be paid semi-annually, and that **\$200** of the principal should be paid at the end of three years, **\$200** more at the end of four years, and the balance at the end of **five** years. Two days afterwards (January 23d, 1862), **Montague** assigned the four declarations of sale, issued to him April **30th**, 1860, to Thomas, and also executed a deed to Thomas for **one** of the lots. This deed states on its face that it was executed for the purpose of releasing and conveying to Thomas any right **Montague** may have acquired by his purchase of the lot at two **tax sales** theretofore made by the city authorities, one February 8th, 1858, and the other May 16th, 1859.

On the 24th of November, 1862, William Stanton, by a writing under his hand and seal, assigned to the defendant all his rights under his contract with Thomas for a reconveyance of the lots, and, by the same writing, directed Thomas to convey the lots to the defendant. The defendant swears that this assignment was made in execution of a contract he had made with Stanton for the purchase of the lots, with other lands, at the price of \$7,200, \$5,000 of which was the price he had agreed to give for these two lots. He further testifies that he fully understood, when he made the purchase, that the deed made by Stanton to Thomas was not intended to have effect as a deed, but was meant to have effect as a mortgage, and that he paid Thomas, in satisfaction of the debt secured by the deed, out of the purchase-money he had agreed to pay to Stanton, the sum of \$2,580. Thomas, in fulfillment of his contract with Stanton, and pursuant to the directions contained in the assignment, conveyed the two lots to the defendant by deed dated January 10th, 1863. The defendant also testified that the five declarations of sale issued to Montague, and also the deed made by Montague to Thomas, were delivered to him with the deed from Thomas to him, and as parts of his muniments of title.

Henry Thomas is the only person now living who took part in the transaction of January, 1862, when Montague's tax titles

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were paid or purchased, and Stanton executed the deed to Thomas Montague, Stanton, and the lawyer under whose direction the business was done, are all dead. Mr. Thomas has been examined as a witness. He swears that he paid the taxes to Montague for the benefit of Stanton's family; that the amount he paid was included in the security he took from Stanton, and that he understood the tax sales were to be canceled at once.

John Stanton, the life tenant, died October 13th, 1877. The complainants are either heirs at law of Ann Stanton or stand in the title of her heirs. Shortly after John Stanton's death, the complainants brought an action of ejectment against the defendant, to recover possession of the two lots of which Ann Stanton died seized. The defendant has appeared and interposed a plea, and in this case he has made no attempt to deny or conceal the fact that on the trial of the action of ejectment, he intends to use the declarations of sale as evidence, and to insist that they, in connection with his other title papers, give him a perfect legal title to the possession of the two lots in controversy, for a long term of years.

To compel the surrender and cancellation of written instruments which have spent their force, and are mere nullities, but which, left in an uncanceled state, may becloud a title, or be used for dishonest purposes, is an ancient and well-established head of equity jurisprudence. If the instrument was originally valid but has, by subsequent events, such as satisfaction, or payment or other extinguishment, become *functus officio*, and the party holding it refuses to surrender or cancel it, the court will compel its surrender, though no present or future use of it, to the prejudice of the complainant, is threatened; for, in such case, its mere existence may seriously cloud the complainant's title, by rendering it possible that ultimately it may be used to overthrow his title, when the facts are no longer capable of complete proof, or have become involved in the obscurities of time. *1 Story's Eq. Jur.* § 705. Equity may intervene, even if the instrument is void by matter apparent on its face, and would be so held at law. But it will not arbitrarily or causelessly change the forum of litigation when an action at law is already pending, and ade-

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quate protection can be given in that forum, but if adequate relief cannot be given at law, or the character of the instrument is such that the court can see that, if used in a trial at law, it will be liable to cause embarrassment, or create great uncertainty, or put the party against whom it may be used in great hazard of losing his just rights, it will assume jurisdiction and compel the surrender of the instrument, or limit its use to such purposes as may seem to it to be equitable. All that is required to justify a resort to equity, when a suit at law is already pending, is, that it shall appear that it is doubtful whether the instrument may not be used in such suit for a dishonest or inequitable purpose. *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Cornish v. Bryan*, 2 Stock. 146; *Metter's Admrs. v. Metter*, 3 C. E. Gr. 270; *Metter v. Metter's Admrs.* 4 C. E. Gr. 457; *Smith v. Smith*, 3 Stew. Eq. 564.

There can be no doubt about what will be the line of defence which the defendant will pursue in defending the action of ejectment. He will insist that the deed from Stanton to Thomas, being absolute on its face, must, according to settled rules of law, be given effect according to its terms, and that its terms, in a common law court, cannot be changed or varied by proof of a parol understanding that it should not have effect as an absolute conveyance, or even by proof of a contemporaneous written agreement to reconvey. He will also insist that as Thomas was never under any duty to pay the taxes and assessments for which the tax sales were made, he had an indisputable legal right, even after he had acquired title to the life estate, to purchase an outstanding tax title, and that such purchase did not enure to the benefit of the remainder-men, nor operate as an extinguishment of the tax title; for such purchase could, in no sense, be characterized as an attempt to build up a title hostile to the remainder-men, on his own default. I think it may well be doubted whether the purchase of a tax title, under the circumstances stated, could be regarded in a court of law as a violation of the principle that a tenant for life shall not, by a violation of his duty to pay taxes, be permitted to acquire the estate in remainder. The defendant has an undoubted right in a court of law to stand

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in the strength and vigor of Thomas's title, as shown by the title papers. The deed from Thomas to the defendant passed all the rights which Thomas had, whether derived from Stanton or Montague, and in the court that must try the action of ejectment the defendant is entitled to have his right to the possession of the land in dispute adjudged by what is written in his title papers, and not by what the parties to them intended. The question whether the deed from Stanton to Thomas was intended by the parties to be a mortgage, or an absolute conveyance, is one that a common law court can neither hear nor determine. That is a question belonging exclusively to equity tribunals, and over which common law tribunals have no jurisdiction whatever. And so, too, the very important question in this case, whether the money paid by Thomas to Montague for the tax-titles, was the money of Stanton or of Thomas, or was subsequently treated by the parties as the money of Stanton by incorporating it in the debt which the deed was given to secure, is one that the court which must try the action of ejectment cannot hear and adjudge. And yet it is manifest, at a glance, that any judgment respecting the rights of these parties, which is not largely controlled by the solution which these questions shall receive, must fail in the accomplishment of justice. This consideration is decisive, in my judgment, as to the power and duty of this court.

The decisive question, then, on the merits, is, have the taxes on which the declarations of sale were founded been paid, so that the declarations have lost all force as evidences of title? The oral evidence on this branch of the case is free from contradiction. It comes entirely from one source. Mr. Henry Thomas is the only person now living, so far as is known, who can give any information respecting it. He swears, as has already been stated, that he paid the taxes on which these declarations of sale were founded, for the benefit of Stanton's family, and that the amount he so paid was afterwards included in the security he took from Stanton. If this evidence is believed, the declaration of sale possesses, in equity, no more force as evidences of title than so many pieces of blank paper. It is true they were not canceled when the taxes were paid, as Mr. Thomas says it wa

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understood they should be; on the contrary, they were transferred to Mr. Thomas. But it is quite clear, I think, that the transfers were not made for the purpose of building up or keeping alive a title hostile to that of William Stanton. Stanton had appealed to Thomas to protect him against a danger which threatened his possession, and Thomas had promised to help him. This put Thomas in a position of trust, where, if he acquired the tax titles, he was bound to hold them for the benefit of Stanton. That, I have no doubt, was his purpose in taking them. The deed and assignments from Montague were simply intended by Thomas to augment and strengthen his security for his debt. This is made conspicuously clear by his agreement to reconvey. That provided, upon being paid his debt, he should reconvey. His deed would, of course, pass his whole estate, whether derived from Stanton or Montague, and all parties were bound to know that the moment Stanton paid the taxes, upon which the declarations of sale were founded, the tax titles were extinguished forever. The evidence, considered as a whole, permits but one conclusion, namely, that Thomas paid the taxes with Stanton's money and took an assignment of the tax titles, not to preserve a hostile title, but solely to increase and fortify his security for his debt.

In this condition of affairs, it is obvious the moment Stanton paid his debt to Thomas, the tax titles became mere nullities. That debt was paid by Stanton in January, 1863. This fact is proved by the defendant's own oath. He says he purchased the two lots in dispute of William Stanton, in November, 1862, for \$5,000, and of this sum, he paid to Thomas, in January, 1863, in satisfaction of Stanton's debt, the sum of \$2,580. He knew, at the time he made this payment, and also when he made the contract of purchase, that Thomas held the land not as owner, but merely by way of mortgage, and simply as security for his debt. This payment operated as a complete extinguishment of the tax titles. Even if Stanton had intended to preserve the tax titles, and that his payment to Thomas should have effect as a purchase, and not as a payment in extinguishment of the taxes, the law would not permit him to accomplish his purpose, for the

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principle is universal that a purchase by one whose duty it was to pay the taxes, shall operate only as an extinguishment. One man can acquire no rights against another by a neglect of a duty which he owes to the other. *Cooley on Tax.* 346.

The declarations of sale must be declared to be nullities, and inasmuch as their production in evidence on the trial of the action of ejectment may unjustly imperil the rights of the complainants, their surrender and cancellation must be decreed.

The defendant, however, insists that such decree should not be made except upon terms. He says when he purchased of William Stanton he believed Stanton held the lots in dispute in fee, and continued to believe so until 1875 or 1876, and that, in the meantime, he had, in good faith, made large expenditures in permanent improvements, which add greatly to the present value of the land, and which the complainants will take if he is ejected. He insists that the complainants should not be allowed to recover possession until they have made reasonable compensation for such improvements. There can be no dispute that it is a well-established doctrine of equity that where a party lawfully in the possession of land, under a title which turns out to be defective, makes permanent improvements, in good faith, before he has notice that his title is defective, which materially increase the value of the inheritance, and the actual owner afterwards seeks relief against him in equity, relief will not be given except upon equitable terms. *2 Story's Eq. Jur.* § 1237. But there are two reasons, I think, why this rule cannot be applied to this case. First, it is not yet determined which of these parties is entitled to the possession of the lands in dispute, and this court has no jurisdiction over that question. It is clear the defendant is, in no event, entitled to compensation from the complainants until their right to possession is established. This court cannot anticipate the judgment which may finally be pronounced in the action of ejectment, or make a provisional decree, which shall give or deny relief to the defendant, according as the suit at law may be decided against him or for him.

Second, the proofs, as I view them, fail to show satisfactorily, that the defendant's mistake (conceding now that he acted under

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a mistake) was not the result of his own inexcusable negligence. The title to the lands in controversy, long prior to the defendant's purchase, had been the subject of both legislative and judicial investigation. On the death of Ann Stanton's first husband, Barney Colgan, these lands escheated, and the right of the state was afterwards ceded to her by the name of Ann Colgan, by special act of the legislature, approved March 8th, 1836. *P. L. of 1836 p. 320*. The title thus conferred upon her was afterwards disputed, by suit, by two of her husband's alien brothers. Their suit was tried in the Hudson circuit court, in December, 1853, and resulted in a verdict in their favor, but was subsequently decided against them by the supreme court. *Colgan v. McKeon, 4 Zab. 566*. The defendant, in procuring title, called to his aid a lawyer of experience and learning, who, I have no doubt, was perfectly familiar with the legal history of this title, and who, it is difficult to believe, did not impart to the defendant all that he knew concerning it. The defendant, however, says he did not. But he also says that he did nothing whatever to ascertain the extent or quantity of Stanton's estate. He believed, he says, because Stanton was in possession, and he had never heard anything to the contrary, that Stanton owned the lands in fee, but he freely admits that he made no inquiry, nor search, nor investigation or exploration of any kind. To a question requiring him to give the reasons why he believed Stanton had a fee, he made this extraordinary answer: "I was not paying all the money down in a lump; I was paying him gradually, and if I discovered, at any time before he got the full amount, that anything was wrong, I could stop." His mistake, if any, in fact, existed—and I am free to say I think there is grave reason to doubt—was manifestly the result of the most reckless carelessness. The observance of any degree of care, or the practice of the least caution, would have made it impossible for him to fall into any error. Mistakes committed under such circumstances cannot be made the basis of relief in equity. *Haggerty v. McCanna, 10 C. E. Gr. 48*.

The defendant also insists that he should not be required to surrender the two declarations of sale founded on assessments for

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the construction of a sewer, except on condition that the complainants first pay him such parts thereof as are properly chargeable against the estate in remainder. A tenant for life must pay ordinary taxes. That rule is not open to discussion. But an assessment for the cost of a local improvement, which increases the value of the inheritance, stands on a different footing. With respect to such impositions, the tenant for life has a right to ask for an apportionment. According to the rule adopted in Massachusetts and New York, the tenant for life is required to contribute to the extent of interest during his life on the amount paid, and at his death the remainder-man must bear the charge of the principal, and thus they are made to share the burden in the same proportions in which they would share the benefits of an assessment for damages in their favor. *Plympton v. Boston Dispensary*, 106 Mass. 544; *Stilwell v. Doughty*, 2 Brad. 311. But what right has the defendant to ask for an apportionment, or to be repaid any part of the sewer assessments? He did not pay them, nor has he shown any title or authority entitling him to stand in the rights of the person who did pay them. According to the defendant's own evidence they were paid with Stanton's money, with money which he had agreed to pay Stanton for the land. Stanton may have a right to ask for an apportionment, and to be re-imbursed, but the defendant certainly has no such right.

The complainants are entitled to a decree without conditions or terms, and that the defendants pay their costs.

McGregor v. Home Insurance Co. of Newark.

JOHN MCGREGOR et al.

v.

THE HOME INSURANCE COMPANY OF NEWARK, NEW JERSEY.

1. Where preferred stock is issued under a contract or law containing no provision or direction as to what shall be the rights of the holders of it in the distribution of capital when the affairs of the company are wound up, such stock merely has a right to be preferred in the division of profits, and not in the distribution of capital.

2. The general corporation act of this state directs that in the distribution of capital the holders of preferred stock shall be first paid, before any distribution is made to the holders of the common stock; therefore preferred stock issued in this state, either under authority of law or under a contract of which the law forms a part, is entitled to preference in the distribution of capital.

3. Dividends on preferred stock can only be paid out of the profits; and this is so even when the stock is issued under a guaranty that a dividend of a certain sum shall be paid annually.

4. The rule of distribution presented by the corporation act must be observed, whether the affairs of a corporation are wound up by the court or the officers of the corporation.

5. A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within its letter.

On application for injunction. Heard on bill, answer and order to show cause.

Mr. Joseph Coult, for motion.

Mr. J. F. Fort, contra.

THE VICE-CHANCELLOR.

This is an application for an injunction. The complainants are stockholders of the Home Insurance Company of Newark, a corporation which has ceased to do business, and is in process of being wound up by its officers. The particular grievance of which the complainants complain is the division or distribution which the officers propose to make of the assets which remain for division among the stockholders.

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McGregor v. Home Insurance Co. of Newark.

The corporation suspended business about the 1st of April, 1879, and on the 14th of that month its directors passed a resolution to dissolve and wind up. This action was sanctioned and approved by more than two-thirds in interest of all the stockholders, at a general meeting of the stockholders legally called and held May 21st, 1879. Since then, the directors have proceeded far enough in the work of winding up to find that, after the debts and liabilities are paid, it is not probable sufficient assets will be left to return to the holders of the preferred and common stock its full par value. They have already paid to the holders of the preferred stock the full par value of their shares, believing, as a matter of law, that they were entitled to such preference in the division of the capital of the corporation. An injunction is asked to restrain any further distribution until the relative rights of the two classes of stockholders shall have been determined. The bill seeks an injunction also on other grounds, but they seem to me to be so effectually overcome by the answer as to dispense with their consideration.

The question is one of contract. The rights of the complainants must be determined by the contract. They are not in position to dispute the validity of the issue of the preferred stock. It was issued with their sanction, and under their covenant and assurance that it should have the same validity as if issued pursuant to law. They must abide by their promise.

I think it must be admitted, according to the general current of authority, that preferred stock, in the absence of an express

not been reached, and such stock is issued therefrom (*Hazelhurst v. Savannah R. R.*, 43 Ga. 53; *Lothan v. Tison*, 54 Id. 139); or there was legislative authority (*Davis v. Proprietors*, 8 Mete. 321; *Rutland R. R. Co. v. Thrall*, 35 Vt. 545); or a restriction to authorized capital, and there was unanimous consent of the stockholders (*Prouty v. U. S. and N. I. R. R.*, 1 Hun 663; 43 Ga. 53, *supra*); or there was power to redeem, which was a transaction in the nature of a debt (*Westchester &c. R. R. Co. v. Jackson*, 77 Pa. St. 321); or the opinion was *obiter* (*Bates v. Androscoggin R. R. Co.*, 49 Maine 491); or it was the case of a subscription for stock, with a condition for interest until the corporation was in operation (*Richardson v. Vt. and Mass. R. R. Co.*, 44 Vt. 613); or it was an action on a subscription more favorable to defendant than to other subscribers, and it was held that defendant could not set up the lack of equality (*Evansville R. R. Co. v. Evansville*, 15 Ind. 395); or a solemn de-

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stipulation or direction to the contrary, simply gives the holder a right of preference in the division of profits, and not in the distribution of capital. And even when it is issued under an agreement or guarantee that a dividend of a fixed sum shall be paid on it annually, such dividend can only be paid out of net earnings or profits; and if no profits are made, no dividend can be paid. *Lockhart v. Van Alstyne*, 31 Mich. 76, 14 Am. L. R. (N. S.) 180; *Taft v. Hartford, Providence and Fishkill R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575. This question has been presented for the consideration of the courts only in a few instances, but the adjudications are harmonious and decisive. *In re London India Rubber Co.*, L. R. (5 Eq. Cas.) 519, two-thirds of the stock issued was preferred. The articles of association provided that as soon as the holders of the preferred stock should have received out of the profits a sum amounting in the whole to the total capital which had been paid up on their shares, together with interest or dividend, at the rate of seven and one-half per cent. per annum, the preferred and common stock should be amalgamated, and the holders of each should thereafter participate equally in the profits, and all distinction between the shares should cease. It was further provided that until the amalgamation took place, the holders of the common stock should have no right to vote at any general meeting of the stockholders, except upon the question whether the capital of the company should be increased or not. In deciding how the surplus assets should be distributed among the stockholders, Vice-Chancellor Malins held that their rights

termination of this question was not necessary for the disposal of the case (*Williston v. U. S. and N. I. R. R. Co.*, 13 Allen 400); or the issue was authorized by the articles of association (*In re A' D. St. Nar. and Col. Co.*, 20 L. R. (Eq.) 339); or there was full knowledge on the part of all concerned (*Lockhart v. Van Alstyne*, 31 Mich. 81); or the power in the corporate body was conceded, and it was denied that it existed in the directors (*McLaughlin v. D. and M. R. R.*, 8 Id. 100)."

See, further, *Sterens v. South Deroon Co.*, 9 Hare 312; *Henry v. Great Northern Co.*, 1 De G. & J. 606; *Sturge v. Eastern Union Co.*, 6 De G. M. & G. 158; *Cuey v. Belfast R. R. Co.*, 1r. L. R. (2 Com. Law) 112; *Dickinson v. C. and O. R. R.*, 7 W. Va. 390; *Bryant v. Ohio College*, 1 Cin. S. C. 67; *Covington v. Covington Bridge Co.*, 10 Bush 69; *King v. Ohio and Miss. R. R.*, 9 Reporter 431; *Green's Brice's Ultra Vires* (2d Am. ed.) 164.—REP.

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did not depend upon any abstract notions of justice, but must be **determined** by the contract into which they had entered; that **their** contract made no provision for a distribution of assets, in **case** it became necessary to wind up the corporation, but simply **regulated** their rights in the corporation as a going concern, and **that** the only distinction it made between the two classes of shareholders was that it gave the preferred stock a preference in the **division** of profits. His conclusion is thus expressed :

“ **I** wish it understood that I decide the case upon this principle : that where **there** is a provision for a preferential dividend, but no provision for the **division** of capital upon the breaking up of the concern, any surplus must be **distributed** amongst the shareholders according to their capital, without **reference** to their rights in respect of dividend.”

The present master of the rolls, Sir George Jessel, in deciding **the** same question, likened the relation between the two classes of **stockholders** to the relation existing between copartners. He **said** :

“ **If**, in an ordinary commercial partnership, one or more of the partners has a **larger** share of the profits than is the proportion borne by his share of the **capital** to the capital of the others, * * * that privilege ceases when the **partnership** is dissolved. * * * When the partnership comes to an end, **the** right to the share of the profits comes to an end also; and you distribute **the** assets, after providing for the profits earned up to the time of dissolution, in **proportion** to the partners' shares of the partnership capital.”

He held that the same rule should be adopted in distributing **the** surplus assets of a defunct corporation. Aside from the **right** of preference in the division of the profits, he held that **the** position of all the shareholders is exactly the same. He **added** :

“ **The** result, therefore, is that when a dissolution arrives, and no more profits **are** earned, all the shareholders stand in exactly the same position, and are **entitled** to the capital *pro rata*.” *Griffith v. Paget*, L. R. (6 Ch. Div.) 511.

The same views were expressed by Malins, V. C., *In re Bangor and Portmadoc Slate and Slab Co.*, L. R. (20 Eq. Cas.) 59.

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There, however, the preferred shareholders were held to be entitled to be first paid, because that course of distribution was clearly directed by the articles of association.

These authorities establish the doctrine that the rights of the two classes of stockholders, in such cases, must be determined by their contract, and that unless that gives a preference in the distribution of capital, the surplus assets must be distributed equally among all the stock. What, then, are the rights of the parties under this contract? The contract contains no express direction upon the subject. It simply provides for the issuing of preferred stock, and that such stock, when issued, shall be legal and valid the same as if issued pursuant to law. It puts the stock on the footing of preferred stock issued by authority of law, and make the law a part of their arrangement. What, then, are the rights in this respect, of holders of preferred stock issued by authority of the law of this state? The main purpose to be accomplished in construing a contract is to give effect to the intention of the parties—to give effect to what both understood, or should have understood. It is to be presumed always that the parties have made their contract with reference to the *lex loci*; and if they have used terms or phrases having a settled meaning in the local law, it must also be presumed that they used them in their legal signification. It is, therefore, always the duty of the court, in expounding a contract, to consider the law prevailing at the place where the contract was made. Here the parties have made the law a part of their contract.

Prior to the time when this contract was made, our legislature had declared and defined what should be the rights of a preferred stockholder in the distribution of the capital of a defunct corporation. The eightieth section of the general corporation act in directing how the surplus assets of a corporation, wound up under that act, shall be distributed by this court, declares that "the surplus funds, if any, after payment of creditors, and costs and expenses, and the preferred stockholders, may be divided and paid to the general stockholders proportionally, according to their respective shares." *Rev. 191*. This I regard as a legislative declaration of what are the rights of the holders of pr

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ferred stock, when the law or contract under which the stock is issued does not in any way limit or restrict them. So, I infer, it is understood by the court of errors and appeals. *Mayer v. Attorney-General*, 5 Stew. Eq. 815. It is quite obvious, I think, from the remarks of Vice-Chancellor Malins, *In re London India Rubber Co.*, L. R. (5 Eq. Cas.) 519, that had the English statute contained a similar direction, he would have felt himself bound by it, and would have been compelled to pronounce a judgment the exact opposite of that which he did pronounce. The officers of the corporation unquestionably understood the contract in accordance with its legislative interpretation, for they say that in procuring subscriptions to this stock, they represented that it should be paid in full, before anything was distributed to the common stock.

In view of this statute, I think it must be adjudged that, by the proper construction of the contract under consideration, the holders of the preferred stock of this corporation are, in the distribution of capital, to be first paid. The court has nothing to do with the wisdom or policy of this statute. It is possible, if the legislature had had the aid of the arguments made upon this question by Vice-Chancellor Malins and Sir George Jessel, a different mode of distribution would have been prescribed; but it is their province to make the law, and the court must restrict itself to the duty of expounding and enforcing it.

The fact that this corporation is being wound up by its officers, and not under the direction of this court, does not alter the rights of the parties nor change the method of distribution. The primary object of the statute, so far as it affects stockholders, was to define their rights; and the rule it prescribes upon that subject must be taken as the measure of their rights, whether they are wrought out by the court or through some other instrumentality. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. 4 Bac. Abr. 648 (Stat. I. ¶ 42); *Oates v. National Bank*, 100 U. S. 239.

The complainants are not entitled to an injunction, and the order to show cause must therefore be dismissed, with costs.

Jones v. Knauss.

JOHN K. JONES et al.

v.

WILLIAM H. KNAUSS.

A complainant who is a non-resident will not be required to give security for costs, if he is joined with a resident complainant.

On motion to discharge order.

Mr. Benjamin C. Potts, for motion.

Mr. F. H. Pilch, contra.

THE VICE-CHANCELLOR.

This is a motion to discharge an order requiring the complainants to give security for costs, and staying all proceedings until it be given. There are three complainants, two resident in this state, and the other a resident of Pennsylvania.

The practice seems to be settled against the defendant's right to security in such a case. A complainant who is a non-resident will not be required to give security for costs, if he is joined with a resident complainant. *1 Hoffman's Ch. Pr. 204; 1 Dan. Ch. Pr. 28; 1 Smith's Ch. Pr. 555; Winthrop v. Royal Ass. Co., 1 Dick. 282; Walker v. Easterby, 6 Ves. 612.* In the case last cited, the reason given by Lord Eldon for the rule is this: That where one of the complainants is within the jurisdiction, as each is bound for the whole costs, the defendant has security. There, there were two complainants, one resident within the jurisdiction, and the other not; an order for security was obtained *ex parte*, and subsequently a motion was made to discharge it, on the ground that it had been improperly granted. Lord Eldon discharged it, but without costs.

The order in this case having been made contrary to the established practice, must be discharged.

NOTE.—Statutes requiring non-resident parties to actions to give security for costs, are constitutional, (*Nease v. Capehart, 15 W. Va. 299; Haney v. Mar-*

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shall, 9 Md. 194; *Conley v. Woonsocket*, 11 R. I. 147; see *Oatman v. Bond*, 15 Wis. 20).

The cases uniformly hold that where one of several parties is a resident, security cannot be demanded (*Anon.* 7 Taunt. 307; *Anon.* 2 Cr. & Jer. 88, 1 Dowl. P. C. 300; *Bawden v. Roe*, 1 Hodges 315; *Thomel v. Roelants*, 2 C. B. 290; *Anon.* Penning. 886; *Jemison's Case*, 31 Ala. 392; *Thalman v. Barbour*, 5 Ind. 178; *Zimmerman v. Mendenhall*, 2 Miles 402; *Mayer v. Tyson*, 1 Bland 564); even when the resident party is insolvent (*McConnell v. Johnston*, 1 East 431; *Reddick v. Sinnott*, 1 Hud. & Bro. 204; *Peterson v. Smith*, 5 Hal. 192; *Pfister v. Gillespie*, 2 Johns. Cas. 109; *Ten Broeck v. Reynolds*, 13 How. Pr. 462; see *Wood v. Goss*, 24 Ill. 626).

The same rules apply where a suit is brought in the name of a non-resident plaintiff for the benefit or use of a resident (*Youde v. Youde*, 3 A. & E. 311; *Seward v. Wilson*, 1 Scam. 192; but see *Lewis v. Lewis*, 25 Ala. 315; *Bush's Case*, 29 Ala. 50; *Caton v. Harmon*, 1 Scam. 581; *O'Connell v. Rea*, 51 Ill. 306).

Aliter, where the suit is brought by a resident plaintiff for the use of a non-resident (*Buckmaster v. Beames*, 8 Ill. 1; *Smith v. Rossiter*, 11 Ill. 119; *Ingles v. Hume*, 3 B. Mon. 33; *Palmer v. Hicks*, 17 Ark. 505; but see *Charles v. Waterman*, 2 How. Pr. 122; *Morgan v. Hale*, 12 W. Va. 713; *Gookin v. Upham*, 22 N. H. 38; *Burker v. Hutchinson*, 7 Ir. Eq. 508; *Swift v. Collins*, 1 Denio 659).

Non-resident executors and administrators must give security (*Chamberlain v. Chamberlain*, 1 Dowl. P. C. 366; *Shaw v. Dempsey*, Sau. & Sc. 628; *Chevalier v. Fox*, 1 Brod. & B. 277; *Smith v. Sandford*, 3 Ir. Jur. 253; *Murfee v. Leper*, 1 Overt. 1; *Davis v. You*, 43 Ala. 691; *Newton v. Croke*, 10 Ark. 169; *Murphy v. Darlington*, 1 Code Rep. 85; but see *Goodrich v. Pendleton*, 5 Johns. Ch. 520; *Crawell v. Littlefield*, 2 Rich. 17); or a non-resident guardian of an infant plaintiff, although some of the coplaintiffs are residents (*Ten Broeck v. Reynolds*, 13 How. Pr. 462; see *Landen v. Parr*, 16 L. J. (Ch.) 269; *Kerr v. Gillespie*, 7 Beav. 269).

A foreign corporation must give bond for costs, although many of its members are residents (*Limerick R. R. v. Fraser*, 4 Bing. 394; *Ross v. Hawey*, 32 Ga. 388; see *Mechanics Bank v. Goodwin*, 2 Green 439; *Washington R. R. v. Alexandria R. R.*, 19 Gratt. 592; *Bank v. Jessup*, 19 Wend. 10; *Republic v. Erlanger, L. R.* (3 Ch. Div.) 62).

Non-resident plaintiffs may sue *in forma pauperis* (*Lisenbee Co. v. Holt*, 1 Sneed 42; *Porter v. Jones*, 68 N. C. 320; CONTRA, *Kelty v. Valle*, 66 Mo. 601).

In an action by a husband and wife, the husband, if resident abroad, must give security (*Hanmer v. Mangles*, 12 M. & W. 313; *Habgood v. Paul*, 8 Ir. C. L. App. xxxiii.; *Smith v. Sanford*, 3 Ir. Jur. 253; see *Cole's Case*, 28 Ala. 50; *Smith v. Etches*, 1 Hem. & M. 711; *Adams v. Waters*, 50 Ind. 325; *Haney v. Lundie*, 58 Ala. 100; *Ring v. Nettles*, 3 Ir. Eq. 53).

Query, as to the liability of the attorney of record for costs, where one plaintiff was a non-resident and the other a resident, and the latter died or went abroad after the suit was instituted (*Jackson v. Powell*, 2 Johns. Cas. 67; *Burgess v. Gregory*, 1 Edw. Ch. 449; *Searle v. Mann*, 1 Miles 321; *Hodson v. Mc-*

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Queen, 7 Ir. C. L. 288; *Green v. Charnock*, 1 Ves. 396; *Gilbert v. Gilbert* Puige 603; *Habgood v. Paul*, 8 Ir. C. L. App. xxxiii.; *Rossell v. Inslee*, 1 H 475; *Newman v. Landrine*, 1 McCart. 291; *Vance v. Bird*, 4 Munf. 364; *Lazar v. Cota*, 43 N. H. 82; *Haney v. Marshall*, 9 Md. 194; *Parsons v. Williams* 9 Conn. 236; *Sharp v. Buffington*, 2 Watts & Serg. 454; *Philpot v. McArthur*, Me. 127; *Weeks v. Cole*, 14 Ves. 518; *Anon. Dick*. 775; *People v. Oncida* C 18 Wend. 652; *Long v. Hall*, 3 Sandf. 729; *Button v. Hannibal R. R.*, 51 A 153).

Citizens of one state, authorizing a suit to be brought in another, are personally liable for the costs adjudged against them there, although they may never have been in the other state, and such judgment may be enforced at the domicile, *Walton v. Sugg*, Phil. (N. C.) 98.—REP.

CHARLES PINNELL

v.

ADONIJAH S. BOYD.

1. A purchaser of the mere equity of redemption, in premises covered by usurious mortgage, who purchases subject to the lien of the mortgage, cannot set up usury as a defence.

2. A material and controlling fact, which is clearly and fully averred in the bill and not denied or alluded to in the answer, must be taken as confessed.

On final hearing on bill, answer and proofs.

Mr. John C. Besson, for complainant.

Mr. S. B. Ransom, for defendant.

THE VICE-CHANCELLOR.

This is a foreclosure suit. The defence is usury. It is not made by the mortgagor, but by a purchaser of the mortgage premises, who acquired title under the foreclosure of a mortgage executed subsequent to that of the complainant. The point of dispute is whether, under the averments of the bill, and the admissions made by the defendant in his answer, he is not pr

Pinnell v. Boyd.

cluded from setting up usury. The bill charges that the mortgaged premises were sold to the defendant, at sheriff's sale, "subject to the lien of the complainant's mortgage." The answer admits this charge. It says that the mortgaged premises were sold, as in the complainant's bill set out, under proceedings instituted upon a mortgage given subsequent to that of the complainant, and that the defendant became the purchaser at such sale, as in the complainant's bill stated.

Chancellor Green said, in *Dolman v. Cook*, 1 McCart. 63, "The purchaser of the mere equity of redemption, in premises covered by a usurious mortgage, who purchased subject to the lien of the mortgage, cannot set up usury as a defence." He had previously used precisely the same language in pronouncing the judgment of the court of errors and appeals, in *Brolasky v. Miller*, 1 Stock. 814. This is now the settled doctrine of this court. *Conover v. Hobart*, 9 C. E. Gr. 120; *Lee v. Stiger*, 3 Stew. Eq. 610.

Even if it were possible to so read the answer in this case as to be able to say that it did not admit the material fact charged in the bill, still we would be bound to regard the silence of the answer upon this point as an admission of the fact. A material and controlling fact, which is clearly and fully averred in the bill and not denied or alluded to in the answer, must be taken as confessed. *Sanborn v. Adair*, 2 Stew. Eq. 338.

It is insisted, however, that the averments of the bill in this case are not sufficiently explicit to preclude the defence of usury. It is argued that its averments upon the point under consideration, in order to be sufficiently explicit to demand an express denial from the defendant, to enable him to avail himself of the defence of usury, should have alleged that he took title to the mortgaged premises subject to the particular sum mentioned in the mortgage, or some other expression, stating with equal perspicuity, that he took subject to the sum secured by the mortgage on its face; for, it is said, that an averment simply alleging that he took subject to the lien of the mortgage, is merely saying, in case the mortgage is usurious, that he took subject to such sum as may be recovered upon it according to law. In other words,

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that a usurious mortgage constitutes a lien only for the sum which is legally recoverable upon it.

But an examination of the authorities will show that the draughtsman of the bill has followed, with great exactness, the rule as laid down by all the judges. His averments are as explicit and definite as the formula of the rule itself. Besides, at the time the defendant took title, so far as the pleadings or proof show, the validity of the complainant's mortgage was undisputed, no usury, up to that time, had been charged against it, and if it be true that the defendant, in this condition of affairs, agreed to take the mortgaged premises subject to the lien of this mortgage, the conclusion is unavoidable that all parties understood that the burden he agreed they should bear was the sum which the papers upon their face, showed to be due upon them. And he obtained title to them for that much less than their fair value. If this be the fact, his defence is founded on a violation of good faith, and cannot succeed in a court of equity. Viewed in its most favorable light, his defence is an attempt to speculate upon a violation of law which has done him no harm.

The defendant is precluded, by the admissions of his answer, from setting up usury. The complainant is entitled to a decree without deduction for usury.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY

v.

THE OXFORD IRON COMPANY.

The sixty-third section of the corporation act is in these words: "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing

Delaware, Lackawanna and Western R. R. Co. v. Oxford Iron Co.

labor or service of whatever character, for or as workmen or employees, in the regular employ of such corporation."—*Held*—

(1) **That** the lien so given comes into existence as of the date which the court **adjudges** to be the time when the insolvency occurred which gives it jurisdiction.

(2) **That** persons holding claims for wages, who are not in the employ of a corporation at the time when it becomes insolvent, are not within the policy of the **act**, and therefore have no lien upon the assets thereof.

(3) **That** the presentation of a claim, embracing other items than charges for wages, does not work a forfeiture of the right of lien for the wages, given by the statute.

(4) **That** the laborers in the employ of a corporation at the time of its insolvency have a lien upon the assets thereof for the whole amount of wages due to them respectively, no matter how long before the date of insolvency the wages may have accrued.

(5) **That** the acceptance of a promissory note, without security, does not operate as a waiver of the lien given by the statute, unless an intention to relinquish such right is unmistakably manifested.

(6) **That** the lien given for wages does not include interest which has accrued thereon before the lien attaches.

(7) **That** the proving of a claim for a sum in excess of the amount really due does not work a forfeiture of the right of lien.

On exceptions by the receiver to claims for wages presented against the Oxford Iron Company.

Mr. Flavel McGee, for receiver.

Mr. Henry S. Harris, for claimants.

THE VICE-CHANCELLOR.

To a large number of the claims for wages exhibited against the Oxford Iron Company, and in behalf of which liens are

NOTE.—Ordinarily, a servant is not entitled to a lien or preference in payment for his services (*Hoover v. Epler*, 52 Pa. St. 522; *Lewis v. Patterson*, 20 La. Ann. 294); nor the officers of a corporation (*Croton Ins. Co. Case*, 3 Barb. Ch. 642); nor tort-feasors (*Dwinel v. Fiske*, 9 Me. 21; *Madden v. Kempster*, 1 Camp. 12; *Lempriere v. Pasley*, 2 T. R. 485; *Hotchkiss v. Hunt*, 49 Me. 213; see *Hamilton v. Buck*, 36 Me. 536; *Dorsey v. Langworthy*, 3 Greene (Ia.) 341);

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claimed under the sixty-third section of the corporation act, the receiver excepts, denying that they are entitled to the preference given by that section. The questions raised by these exceptions have been informally brought before the court by agreement of counsel, and fully discussed. I shall dispose of them in the order in which they were discussed. The first relates to the time when it must be adjudged the right of lien accrues—whether that time shall be held to be fixed when the fact of insolvency actually occurs, no matter how long that may be before legal proceedings are instituted, or not until the fact of insolvency is judicially ascertained. The section is in these words:

“In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof, for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word ‘laborers’ shall be construed to include all persons doing labor or service of whatever character, for or as workmen or employees in the regular employ of such corporation.” *Rev. 188.*

That part of the section which creates a lien is practically a transcript of the forty-second section of the act authorizing the establishment of manufacturing corporations. *Nix. Dig. (4th ed.) 539.* The proper construction of the section last mentioned, so far as it affects the question under consideration, was settled in *Bedford v. Newark Machine Co., 1 C. E. Gr. 117.* The purpose of both being the same, and their language being identical, a

nor a creditor on his debtor's chattels in his possession (*Allen v. Meguire, 15 Mass. 490; Brewer v. Pitkin, 11 Pick. 298; Owen v. Dixon, 17 Conn. 492; Bailey v. Ross, 20 N. H. 302; see St. Louis v. Regenfuss, 28 Wis. 144.*)

Within the meaning of statutes giving—(1) *servants*, (2) *laborers*, (3) *employees*, (4) *mechanics*, (5) *artificers* and (6) *operatives*—preferences for wages for work done the following have been deemed (1) *SERVANTS*: An overseer and book-keeper (*Hovey v. Ten Broeck, 3 Roberts. 316*); a superintendent (*Wickham v. Hardy, Jur. (N. S.) 871; Cumberland R. R. v. Slack, 45 Md. 161*); an assistant superintendent (*Vincent v. Bamford, 1 Jon & Spen. 506; see Bryan v. State, 44 Cal. 328*); a mining boss (*Del. Canal Co. v. Carroll, 89 Pa. St. 374*); a civil engineer (*Williamson v. Wadsworth, 49 Barb. 294; see Callahan v. B. & M. R. R., Iowa 562; Pa. R. R. v. Leuffer, 84 Pa. St. 168*); a clerk and foreman (*parte Humphreys, 3 Deac. & Chit. 114; Salina v. Seitz, 16 Kan. 143; Abbot Steam Packet Co., 4 Md. Ch. 310*); a traveler engaged at an annual salary (*parte Neale, 1 Mont. & Muc. 194; see Reg. v. Tite, Leigh & Cave 29; Reg-*

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judicial construction of one determines also the meaning of the other. The case just cited, I understand, settles two propositions: first, that a person not in the employ of the corporation at the time it becomes insolvent, is not entitled to the benefit of the statute; and second, that the insolvency meant in the act is that ascertained by the court as the ground of its jurisdiction. Until a corporation becomes insolvent, and this fact is laid before the court in the regular method of procedure, it has no authority to interfere with the corporation. Until insolvency is charged against it, in legal form, the court is bound to presume it was solvent. Upon this point, Chancellor Green, in the case just cited, said that the statute looks to the insolvency which leads to the proceeding resulting in a judicial determination of insolvency. He further said: "The court cannot, upon an inquiry of this nature [and the inquiry then before the court was as to who was entitled to this lien], undertake to investigate the financial ability of the corporation at previous periods, founded upon a mere failure to meet its engagements, or upon the actual state of its finances, after its business has been suspended." The insolvency which gives rise to this lien is that which is judicially ascertained and becomes the ground of the court's jurisdiction. The court has nothing to do with the previous condition of the corporation. The lien given by the statute comes into existence as of the date which the court adjudges to be the time when the

Negus, L. R. (1 C. C.) 34); the mate of a vessel (*Ex parte Homborg, 6 Jur. 898*); the housekeeper of a hotel (*Lawler v. Linden, Ir. L. R. (10 Com. Law) 188*); a bar-keeper (*Boniface v. Scott, 3 Serg. & Rawle 351*); a journeyman (*Hart v. Aldridge, Cowp. 54, Lofft 493*; see *Landry v. Blanchard, 20 La. Ann. 173*; *Ex parte Gordon, 1 Jur. (N. S.) 683*; *Jobsen v. Boden, 3 Pa. St. 463*; *Phillips on Mech. Liens* § 50); a designer (*Ex parte Ormerod, 1 D. & L. 825*); an oven-placer in a pottery (*Willett v. Boote, 6 H. & N. 26*); a clerk whose wages are not all due (*Thomas v. Williams, 1 A. & E. 685*).

(2) **LABORERS:** A railroad workman with his team (*Warner v. Hudson River R. R., 5 How. Pr. 454*; but as to the team, see *Atcherson v. Troy R. R., 6 Abb. Pr. (N. S.) 329*; *Barnard v. McKenzie, 4 Col. 251*; *Hill v. Neuman, 38 Pa. St. 151*; *Heebner v. Chave, 5 Pa. St. 115*; *Wentworth's Appeal, 82 Pa. St. 469*; *Hope Mining Co., 1 Sawy. 710*; *Coburn v. Kerswell, 35 Me. 126*; *McCrillis v. Wilson, 34 Me. 286*; *Balch v. N. Y. & O. R. R., 46 N. Y. 521*; *Brusie v. Griffith, 34 Chl. 302*; *Branin v. Conn. R. R., 31 Vt. 214*); a laborer, although

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insolvency accrued which gives it jurisdiction. That date in this case, fixed by the decree of the court, is September 6th, 1878, and that must be taken as the time when the right of lien arose.

The second question propounded is, Does this lien arise in favor of an assignee of a claim for wages, who acquired his right prior to the date of insolvency fixed by the decree? The wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it becomes insolvent. If, prior to that time, they are assigned, so that when insolvency occurs they are not due to an employee, no lien arises. Such, I think, is the plain direction of the statute. Its words are, "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof, &c." Only those in the employ of the corporation at the time of its insolvency are within either the words or the policy of the statute. The purpose of the statute is obvious. It is sometimes a matter of the utmost importance to the public that the business of an insolvent corporation should be kept in operation, and it is almost always true that the property of such bodies cannot be preserved unless they are kept up as going concerns. The statute was designed to accomplish both of these purposes. And to this end it was clearly necessary that the employees of a corporation in an insolvent condition, whose skill and labor are indispensable to the continuance of its operations, should be main-

also a mechanic (*Adams v. Goodrich*, 55 Ga. 233; see *Myers v. Buchanan*, Miss. 397); hoisters of materials (*Tizzard v. Hughes*, 3 Phila. 261); one employed by the owner to cook for his workmen (*Young v. French*, 35 Wis. 1); contra, *Sullivan's Appeal*, 77 Pa. St. 107; *McCormick v. Los Angeles Co.*, 40 Cal. 185; a pilot, who was also a contractor (*Hanson v. Hiles*, 34 Iowa 350; *Cook v. Parham*, 24 Ala. 21; *Dudman v. Dublin Board*, Ir. L. R. (7 Com. L. 518); a miner who mines coal for a certain price per ton (*Penna. Coal Co v. Costello*, 33 Pa. St. 241; *Reed's Appeal*, 18 Pa. St. 235); all who work with their own hands (*Seiders's Appeal*, 46 Pa. St. 57; *Ingram v. Barnes*, 7 E. Bl. 115; *Jacobs v. Knapp*, 50 N. H. 71; *Floyd v. Weaver*, 16 Jur. 289; *Carran v. Swan*, 53 Ga. 39; *Robbins v. Rice*, 18 N. H. 507); the digger of a well at a certain price per foot (*Lowther v. Radnor*, 8 East 113); house painter (*Martine v. Nelson*, 51 Ill. 422); a reporter and city editor of a newspaper (*Herries v. Norvell*, 17 Am. Law Reg. (N. S.) 97 and note); a drayman (*Watson v. Watson Co.*, 3 Stew. Eq. 588).

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secure for their wages. To enable an insolvent corporation to retain its employees is the primary object of the statute. Persons holding claims for wages, who are not in the employ of a corporation at the time when it becomes insolvent, are not, therefore, within its policy nor entitled to its protection.

It is undoubtedly true that the assignment of the debt carries with it any security which the assignor holds. But when these assignments were made the assignors had no security or lien. The right of lien arose subsequently, and though the assignors may still have been in the employ of the corporation when it became insolvent, the wages previously assigned were not due to them, but to persons not entitled to the character of employees. The statute creates a lien in favor of no person except an employee who is in the employ of a corporation at the time when it becomes insolvent, and in favor of no debt except for wages due an employee who is in the employ of a corporation at the time when it becomes insolvent.

An assignment made after the lien has attached passes, of course, both wages and lien, and in such case the assignee will hold the debt with its security.

The third question submitted asks whether, if a claim is presented, embracing other items than charges for wages, a lien for any part of it will attach. The statute gives no specific direction as to the method in which claims under this section shall be

Employees or laborers of a sub-contractor may be included. *Branin v. Conn. R. R.*, 31 *Vt.* 214; *Mundt v. Sheboygan R. R.*, 31 *Wis.* 451; *Peters v. St. Louis R. R.*, 24 *Mo.* 586; *Kent v. New York Central R. R.*, 12 *N. Y.* 628; *Graham v. St. Louis R. R.*, 30 *Mo.* 546; *Cosgrove v. Tebo R. R.*, 54 *Mo.* 495; *Hart v. Boston R. R.*, 121 *Mass.* 510; *Conant v. Van Shaick*, 24 *Barb.* 87; *Winslow v. Urquhart*, 39 *Wis.* 260; *Redmond v. Galena R. R.*, *Id.* 426.

But see *Arbuckle v. Illinois R. R.*, 81 *Ill.* 429; *Chiro R. R. v. Watson*, 85 *Ill.* 511; *Gallagher v. Ashby*, 26 *Barb.* 143; *Miller v. Lake Ontario R. R.*, 9 *Ill. Pr.* 238; *Lake Erie R. R. v. Eckler*, 13 *Ind.* 67; *Indianapolis R. R. v. O'Reilly*, 38 *Ind.* 140; *Marks v. Indianapolis R. R.*, *Id.* 440; *Utter v. Crane*, 37 *Iowa* 631; *Doe v. Monson*, 33 *Me.* 430; *Jacobs v. Knapp*, 50 *N. H.* 71; *Guthrie v. Horner*, 12 *Pa. St.* 236.

(3) EMPLOYEES: Counsel who have rendered professional services (*Gurney v. Atlantic and G. W. R. R.*, 58 *N. Y.* 358); police officers (*Mallory v. United States*, 3 *Ct. of Cl.* 257; see *Kimball v. Boston*, 1 *Allen* 417); a laborer on government grounds (*Stone's Case*, 3 *Ct. of Cl.* 260); not one who merely shovels

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proved. Unsecured debts are to be proved in such manner : this court shall direct. *Rev. 188 § 62*. Generally, the books of a corporation contain the only written evidence of the amount of wages due to its employees. When this is the case, no difficulty can arise in ascertaining the sums for which liens may be claimed. To prevent confusion in case an employee happens to have two claims, one entitled to preference and the other not, they should be proved separately, but if he fails or refuses to do so, I know of no principle of law which would justify the court in declaring that he had thereby forfeited his right under the statute. If, in consequence of the intermingling of charges for wages with charges not lienable, serious difficulty should arise in ascertaining how much is due for wages, I think all fair doubt should be resolved against the claimant's right to preference, and he should only be allowed a lien for such sum as clearly appears to be due for wages.

The fourth question discussed is, Does the statute give a lien for wages earned prior to April 7th, 1875? That is the date of the incorporation of the provision under consideration into the general corporation act. Prior to that date it applied to such corporations only as were organized under the act authorizing the establishment of manufacturing corporations. The Oxford Iron Company was created by special charter. *P. L. of 1859 p. 377*.

and loads dirt on a gravel train (*Deppe v. Chicago R. R.*, 36 Iowa 52); a retary (*Wells v. South Minn. R. R.*, 1 Fed. Rep. 270).

(4) MECHANICS: A vendor of machinery is not a machinist (*Kirkpatrick v. Bank of Augusta*, 30 Ga. 465; *Schofield v. Stout*, 59 Ga. 537); a corporation may be (*Loudon v. Coleman*, 59 Ga. 653; *Phillips on Mech. Lien* § 53; *Yonkers River Co. v. Arnold*, 46 Wis. 214; see *Kentucky Lead Co. v. New Albany Works*, 62 Ind. 63); not one who works casually at a trade (*Grantham's Case*, 1 Winst. 73).

(5) ARTIFICERS: A weaver of gloves at an agreed price per dozen (*Chawner v. Cummings*, 8 Q. B. 311; *Moorhouse v. Lee*, 4 F. & F. 354); a "butty collier" (*Bowers v. Lovekin*, 6 El. & Bl. 584; *Sleeman v. Barrett*, 2 H. C. 934; *Pillar v. Llynor Co.*, L. R. (4 C. P.) 752); a vessel iron-plater (*Lurence v. Todd*, 14 C. B. (N. S.) 554); one working manually and also supervising others, for weekly wages and a commission (*Whiteley v. Armitage*, W. R. 144); an overseer in a printing-office (*Bishop v. Letts*, 1 F. & F. 40).

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Statutes are to be construed to operate prospectively, unless a retrospective effect be clearly intended. As a general rule, a statute takes effect only from its date, and therefore, although its words may be broad enough, in their literal signification, to comprehend existing cases, it is to be construed as extending only to cases that shall arise after its date. Even remedial statutes are to be deemed prospective, and are not to be applied to existing proceedings unless a contrary intent be clearly expressed. These are familiar rules of construction.

There is nothing on the face of this statute, and certainly nothing in its policy, which indicates that the legislature intended it should have a retrospective effect. The lien given by it, as against this corporation, attaches only to wages earned since April 7th, 1875.

Some of the employees of the Oxford Iron Company have permitted their wages to remain uncollected for long periods, extending in some instances over three or four years. Whether they did so at the request of the officers of the corporation, or because they believed them to be safe and desired them to accumulate, does not appear. The question raised on this branch of the case is, Are such parts of the claim as embrace wages earned prior to the pay-day immediately preceding the date when the corporation became insolvent, entitled to the preference given by the statute? It is insisted that the statute was not

(6) OPERATIVES: An apprentice (*Ex parte Steiner*, 1 Pa. L. J. Rep. 368; *Bedford v. Newark Machine Co.*, 1 C. E. Gr. 117; see *The Beaver*, 3 Rob. Ad. 292; *Mason v. The Blaireau*, 2 Cranch 240; *Milligan v. Wedge*, 12 A. & E. 737; *New Orleans R. R. v. Harrison*, 48 Miss. 112); or son of a workman (*In re Hartman*, 4 Bank. Reg. 103; *Atcherson v. Troy R. R.*, 6 Abb. Pr. (N. S.) 338; see *Barron v. Collins*, 49 Ga. 580); or wife (*Thayer v. Mann*, 2 Cush. 371; see *Angulo v. Sunol*, 14 Cal. 402).

The following were held to come within none of the classes named: a statute giving redress to "any person" injured on a railroad, does not include a laborer (*Rohbeck v. Pac. R. R.*, 43 Mo. 187); a statute exempting the wages of railroad employees from garnishment was afterwards extended to all employees who were married.—Held, that railroad employees were embraced in the amendment (*Burlander v. Milwaukee R. R.*, 26 Wis. 76; see *Johnston's Estate*, 33 Pa. St. 511); contractors (*Sharman v. Sanders*, 13 C. B. 166; *Ingram v. Barnes*, 7 El. & Bl. 115; *Riley v. Warden*, 2 Exch. 59; *Lehigh Coal Co. v. Central R. R. Co.*,

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intended to give protection to the negligent and slothful, nor to enable employees to use a trading or manufacturing corporation as a savings bank. Its pertinent words are that the employees in the employ of any corporation at the time when it becomes insolvent, shall have a lien "for the amount of wages due to them respectively." This language is plain and easily understood. The inquiry is very simple: Is the sum claimed wages? If the wages have been paid, and then returned as a deposit or loan, the sum due is not wages—they have been paid—but a loan. But if no payment has been made, but the sum due still represents compensation for labor or service, then the case is just the one described by the statute, and is clearly within its words as well as its spirit. There are no restrictive words in this statute, either as to time or amount. The statute regulating assignments for the benefit of creditors limits the sum for which preference may be claimed. *Rev. 38 § 8.* The presence of this limitation in one act, and not in the other, shows very clearly, I think, that the legislature intended to prescribe a different rule in one case from that which was prescribed in the other. This purpose must have effect.

The sixth question is, Does the acceptance of a promissory note operate as a waiver of the lien? This lien, like any other right, may be waived. An intention to extinguish a right may, in certain cases, be as unmistakably manifested by acts as by

2 *Stew. Eq.* 252; *Ney v. Dubuque R. R.*, 20 *Iowa* 347; *Boutwell v. Townsend*, 37 *Barb.* 205; *Cummings v. New York R. R.*, 1 *Lans.* 68; *Chapman v. Black River R. R.*, 4 *Lans.* 96; *Corbin v. Amer. Mills*, 27 *Conn.* 274; *Balch v. N. Y. & O. R. R.*, 46 *N. Y.* 521; *Aikin v. Wasson*, 24 *N. Y.* 482; *Breed v. Nagle*, 46 *Ga.* 112; *Witman v. Walker*, 9 *W. & S.* 183; *Footman v. Pusey*, 45 *Ga.* 561; *Robinson v. Webb*, 11 *Bush* 474; *Chicago R. R. v. McCarthy*, 20 *Ill.* 385; a physician (*Weymouth v. Sanborn*, 43 *N. H.* 171; see *Hunter's Case*, 1 *Winst.* 372); a foreign superintendent of mines (*Hill v. Spencer*, 61 *N. Y.* 274; *Dean v. De Wolf*, 16 *Hun* 186); a time-keeper of laborers (*M. K. & T. R. R. v. Baker*, 14 *Kan.* 563; *Snyder v. Gibbons*, 3 *Phila.* 126); or paymaster (*Edgar v. Salisbury*, 17 *Mo.* 271); a consulting engineer (*Ericsson v. Brown*, 38 *Barb.* 390); a secretary (*Coffin v. Reynolds*, 37 *N. Y.* 640; see *Richardson v. Abendroth*, 45 *Barb.* 162); an architect (*Bank of Pa. v. Gries*, 35 *Pa. St.* 428; *Ames v. Dyer*, 41 *Me.* 397; *Price v. Kirk*, 90 *Pa. St.* —; *Raeder v. Bensberg*, 6 *Mo. App.* 445); *aliter*, where he also superintends the building (*Mut. Ben. Ins. Co. v.*

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words; but to warrant the court in giving acts such force, they must declare the actor's purpose with such clearness and certainty as to be, in effect, a declaration of his intention to give up his rights. The acceptance of a promissory note, without security, is not capable of being so understood; all the inferences to be drawn from such an act run very strongly in the opposite direction. The rule upon this subject, I think, is settled. The acceptance of the debtor's own promissory note for a debt, which may be made the basis of a lien under the mechanics' lien law, is not a waiver of the payee's right of lien. The same rule, I think, should govern here.

The seventh question may be stated as follows: Does this lien include interest? The question, it will be observed, assumes that interest has accrued. What the fact is I have no means of ascertaining, but for the purpose of deciding the question, I shall assume that interest has accrued. Interest is not within the literal terms used—wages alone are mentioned. The employees are to have a lien “for the amount of wages due to them respectively.” Ordinarily, where a debt bears interest, the interest is regarded as an incident of the debt, constituting part of it; and if a lien is given for the debt, it covers the whole debt, including interest. But the word used here is not “debt,” but “wages”—viz., compensation for labor or services. Another part of the section, however, shows that wages was used as synonymous with

Rosard, 11 C. E. Gr. 389; *Knight v. Norris*, 13 Minn. 473; *St. Clair Coal Co. v. Mertz*, 75 Pa. St. 384; *Stryker v. Cassidy*, 76 N. Y. 50; see *Foushee v. Grigsby*, 12 Bush 75; the superintendent of a building, who is also the contractor (*Blakey v. Blakey*, 27 Mo. 39; see *Kansas R. R. v. Little*, 19 Kan. 267); the foreman of a tailor (*Lauran v. Hotz*, 1 Mart. (N. S.) 140); a teacher in an insolvent's school (*Labato's Case*, 2 Mart. (N. S.) 652; see *Dollahite's Case*, 1 Winst. 74); a music master (*Ex parte Walter*, L. R. (15 Eq.) 412); a governess (*Todd v. Kerrick*, 8 Exch. 151); workmen in an iron foundry, as servants, (*Mossan's Case*, 5 Binn. 167; *Ex parte Crauford*, 1 Mont. 270); an undertaker (*Jones v. Shawhan*, 4 W. & S. 257); the guard of a stage-coach (*Ex parte Skinner*, 3 Deac. & Chit. 332); workmen who work by the piece (*Ex parte Grellier*, 1 Mont. 264); a surveyor of wood (*Blackman's Case*, 6 Chicago L. N. 18); “croppers” (*Daniel v. Swearingen*, 6 Rich. (N. S.) 471); one who had agreed to build a wall at a certain price and within a certain time (*Lancaster v. Greaves*, 9 B. & C. 628; *McGinness v. Parrington*, 43 Conn. 143); an overseer

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debt, for the direction is that wages shall be paid prior to other debt or debts. The important considerations on this branch of the case are: Wages are usually paid at short intervals. Such is almost the universal custom. It grows out of the necessities of the employees. They generally work for small compensation, and their daily labor is their only means of support. They are not able to allow their wages to accumulate. Protection against accumulation was, obviously, not one of the purposes of the law. Such cases so rarely happen that it cannot be supposed that the legislature intended to make provision for them. The legislature merely intended to secure to employees their wages, for that is all the protection it was necessary to extend to them to accomplish the end in view, namely, to keep an insolvent corporation in operation as a going concern. In the great majority of cases the amount of wages that an employee will allow to fall in arrear will be very small, and the sum due for interest will be still smaller—so trifling, indeed, that it would have no influence whatever upon his judgment in deciding whether he should stay or seek other employment. Besides, the preference given is a derogation of the common right of equality among creditors of the same rank, and the scope of the statute should not, therefore, be extended by construction. The court is bound to give what is granted, but nothing more. The lien given is for wages, and I think the court is bound to restrict it to wages. No interest.

(*Rust v. Billingslea*, 44 Ga. 308; *Whitaker v. Smith*, 81 N. C. 340; see *Car v. Mathews*, 25 Ga. 571); one engaged in selling and delivering wood by cord at a mill, (*Wadsworth v. Duke*, 50 Ga. 91; see *Palmer v. Tucker*, 45 Ga. 316); a plasterer (*Fox v. Rucker*, 30 Ga. 525; *Parker v. Bell*, 7 Gray 429); a mover of buildings (*Stephens v. Holmes*, 64 Ill. 336); an agent of an insurance company, in another state (*First Nat. Bank v. Jagers*, 51 Md. 38); a policeman (*Johnson v. Mallet*, 2 Winst. 13; see *Buttrick v. Lowell*, 1 Allen 172; *Ball v. Boston*, Id. 417).

Servants &c., who voluntarily leave, forfeit their lien for wages due (*Ex parte Gee*, 3 Deac. 563; *Ex parte Bennett*, 3 Mont. & Ayr. 669; *Napier's Case*, 2 Pug. 300, 3 Pug. 134; *Bedford v. Newark Machine Co.*, 1 C. E. Gr. 117; *Curtis's Case*, 1 Winst. 180; *Sanders's Case*, 2 Mont. & Ayr. 684).

Taking a note for the wages is no waiver (*Weymouth v. Sanborn*, 4 H. 171; *Clement v. Newton*, 78 Ill. 427; *Laviolette v. Redding*, 4 B. Mon. 171; *Globe v. Gale*, 7 Blackf. 218; *Meeks v. Sims*, 84 Ill. 422; *McMurray v. To*

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should be allowed before the lien attaches; after that, interest should be allowed.

The counsel of the receiver charges that some of the claims have been proved for sums in excess of the amounts really due. Such claims, he insists, are fraudulent; and for that reason it is the duty of the court to declare the right of lien, in respect to them, to be forfeited. There is no evidence of fraud before the court. But suppose there was—the statute does not make fraud a cause of forfeiture. It contains no words of forfeiture for any cause. Such a purpose must not be imputed to the law-making power, in the absence of clear words, or an implication so strong as to be equivalent to express words. *Reeve v. Elmendorf*, 9 Vr. 125, has no application to the matter in hand. There is no analogy, in any point of view, between the two cases. Usually the officers of a corporation are much better informed as to the amounts due to its creditors of this class than are the creditors themselves. Their books frequently contain the only account existing between the parties, and in case of dispute are resorted to by both parties as their mutual arbiter. It is not pretended in this case that the least difficulty will be encountered in ascertaining the actual amounts due.

In my judgment, the mere fact that a claim for wages is presented for a sum in excess of the amount really due, does not deprive the claimant of the preference given to him by the statute.

30 Mo. 263; *Morrison v. Laura*, 40 Mo. 260; *Blake v. Pitcher*, 50 Md. 453; *Prentiss v. Garland*, 67 Me. 345; *Hutchinson v. Swartsweller*, 4 Stew. Eq. 205; *White v. Dumpke*, 45 Wis. 454; see *Hutchins v. Olcott*, 4 Vt. 549; *Green v. Fox*, 7 Allen 85; *Ehlers v. Elden*, 51 Miss. 495; *Schneider v. Kolchoff*, 59 Ind. 568; *Napier's Case*, 2 Pug. 300).

A laborer's lien is not assignable (*Cairo & V. R. R. v. Fackney*, 78 Ill. 116; *Wing v. Griffin*, 1 E. D. Smith 162; *Ruggles v. Walker*, 34 Vt. 468; *Rollin v. Cross*, 45 N. Y. 766; *Dano v. M. & O. R. R.*, 27 Ark. 564; *Tewksbury v. Bronson*, 48 Wis. 581; see *Krauser v. Ruckel*, 17 Hun 463; *Rogers v. Omaha Co.*, 4 Neb. 54; *Goff v. Papin*, 34 Mo. 177; *Brown's Case*, 4 Ben. 142; *Nash v. Mosher*, 19 Wend. 431; *Sinton v. Roberts*, 46 Ind. 476; *Farwell v. Grier*, 38 Iowa 83; *Bonnell v. Holt*, 89 Ill. 71; *Kerr v. Moore*, 54 Miss. 286; *Peters v. St. Louis R. R.*, 24 Mo. 586; also *Phillips on Mech. Lien*, ch. VI.)—REP.

Sergent v. Sergent.

MARTHA A. SERGENT

v.

AUGUSTUS G. SERGENT.

1. To establish desertion, three things must be proved: first, cessation of cohabitation; second, an intent in the mind of the defendant to desert; and, third, that the desertion was against the will of the complainant.

2. To constitute desertion, the deserter must absent himself or herself from the other party, of his or her own accord, and without the consent and against the will of the other.

3. That one is the deserter in whose mind the desire and intent to destroy the marriage relation exist, though the other may be the one, who, by open conduct, throws off marital duty and allegiance.

On final hearing on bill and *ex parte* proofs.

Mr. Flavel McGee, for complainant.

THE VICE-CHANCELLOR.

This is a suit by a wife for divorce for the cause of desertion. The husband makes no defence. The following are the material facts: The parties were married in Boston, in 1861, and immediately afterwards took up their residence in Jersey City, where they continued to reside together until April, 1876, when, it is alleged, the defendant deserted the complainant, and has never since lived with her. For some years prior to the separation the defendant had been an habitual drunkard. He was frequently arrested and committed for drunkenness. He was without means, and his intemperate habits rendered him unfit for labor or business. The complainant says, for two years prior to the separation, he contributed nothing towards the support of his family, but she had supported him. When he left, their relations were pleasant; he went without warning or notice. The parting is thus described by the complainant: "He gave me no reason for going away; he did not tell me he was going; he simply went, and did not come back; he went out without saying anything

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in particular, and never came back ; I had given him no provocation ; on the contrary, I had taken good care of him, supported him, and cared for him when he came home drunk." After he left, the complainant made no effort to find him, or to ascertain what had become of him, but immediately after he left, she commenced furnishing him with money through a friend, giving him \$3 or \$4 whenever he called for it, and she continued to do so up to the time she brought her suit. The contributions thus made, she says, averaged \$3 a week. In August, 1876, he called on her at her mother's house, in Boston. He knew she was there. How he obtained this information, does not appear. He expected to enter a hospital in Boston, to undergo a surgical operation, and called on her to request her to visit him there. She went and had an interview with him, and gave him money, at his request, to pay his fare from Boston to New York. On this occasion she did not ask him why he had left her, nor whether he intended to return.

As portrayed by the evidence, the defendant is certainly a very undesirable husband. That, however, is not the question. This court, fortunately, is not charged with the duty of revising or dissolving undesirable or ill-assorted matches. The question here is, does the evidence show a case of desertion within the meaning of the statute? Mere absence by a husband from his wife for three years is not necessarily desertion. *Rogers v. Rogers*, 3 C. E. Gr. 445 ; *Test v. Test*, 4 C. E. Gr. 342 ; *Tate v. Tate*, 11 C. E. Gr. 55. If a wife leaves her husband, and he furnishes her with money for her support, and does not insist, as a condition of support, that she shall perform her duty as a wife, although he entreats her to come back, the conduct of the parties, in such case, partakes too much of the character of a friendly arrangement to render the wife a deserter. *Goldbeck v. Goldbeck*, 3 C. E. Gr. 42.

To establish desertion, three things must be proved : First, cessation of cohabitation ; second, an intent in the mind of the defendant to desert ; and, third, that the desertion was against the will of the complainant. Sir Creswell Creswell, in *Thompson v. Thompson*, 1 Sw. & Tr. 231, says : "The absence and ces-

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sation of cohabitation must be in spite of the wish of the deserted party; the person deserted must not be a consenting party." And this court has repeatedly declared that, to constitute desertion, the deserter must absent himself or herself from the other party of his or her own accord, and without the consent and against the will of the other. *Jennings v. Jennings*, 2 Beas. 38; *Cook v. Cook*, Id. 263; *Moore v. Moore*, 1 C. E. Gr. 275; *Meldowney v. Meldowney*, 12 C. E. Gr. 328; *Taylor v. Taylor*, 1 Stew. Eq. 207. That one is the deserter in whose mind the desire and intent to destroy the marriage relation exists, though the other may be the one who, by open conduct, throws off marital duty and allegiance. It is not always the one who leaves the matrimonial habitation that is the deserter. 1 Bish. on M. & D. § 787. If, in this case, the wife, while the husband was absent, laid a plan to keep him away, and so far executed it as to keep him away for the statutory period, her purpose all the time being to lay the foundation for a suit for divorce, his absence, though to a certain extent voluntary, was not against her will, but just what she wanted, and would not, therefore, be cause of divorce. In such case she would be a consenting party; indeed, she would be helping her husband to commit a wrong against her in order that she might take advantage of it.

These principles must govern this case. Did the defendant go away and stay away from his wife without her consent and against her will? He is not the sort of a husband a decent woman would be anxious to live with. It is certain she made no effort to lure him back; on the contrary, almost contemporaneously with his leaving, she made provision for his support, so that when his appetite was aroused, or he was hungry, or shelterless, he would not be driven to her home. Her conduct in this respect cannot be attributed to love or pity. Unless there was some understanding between them, which has not been disclosed, she had no reason to suppose he would not return. He had told her he would not, nor does it appear that she had been notified that he was in distress when she made arrangements to have aid extended to him. If, when she found he did not return, her heart became troubled, and she felt solicitous for his welfare, the most natural thing for her to have done would have been to

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endeavor to find him, and, if possible, induce him to return to his home. Besides, it seems quite mysterious to me, if there was no previous understanding or arrangement, and if it be true that he went away without reason or warning, and then remained absent, how it happened that she knew where to deposit money so that it would reach him, and he knew just where to apply for it.

The conduct of the parties when they met in Boston, in August, 1876, is even more difficult to understand, except we believe they had separated by agreement. They had then been apart about four months; they had parted pleasantly; the husband's subsequent conduct had been mysteriously unnatural. According to the wife's story, he had causelessly and foolishly forsaken a good home, where he had food and shelter and kind attention, that he might lead the life of a vagabond, and wander about homeless and friendless. There is no explanation of his conduct except we attribute it to shame, but shame seldom troubles a man so thoroughly debauched as he is represented to have been. Now what occurs when they meet? There are no reproaches, explanations or inquiries. Though the wife did not know why he had left her, she does not ask him, nor does he attempt to justify or explain his conduct; though she does not know whether he intends to return or not, she does not ask him, nor does he tell her. He had been unfaithful to every conjugal duty, yet they meet upon perfectly amicable terms; the wife has no reproaches for the past, and no curiosity about the future. Such conduct is inexplicable except their separation was the result of an understanding, and the defendant left his wife under a promise that he should be provided for in the future. Then it is easily understood.

The court, in cases of this kind, must examine the conduct of the parties in the light of ordinary experience, with caution enough not to be misled by false appearances, and with discernment sufficient not to be duped by tales in which only part of the truth is told.

The evidence fails to convince me that the separation shown in this case was a desertion by the husband. A divorce must be denied, and the complainant's bill dismissed.

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LAURA A. SNYDER

v.

JOHN A. BLAIR et al.

1. In ascertaining the sum for which a decree for deficiency should be made, the sum for which the mortgaged premises were sold must, so long as the sale stands, be taken, as between the parties to the suit, as a conclusive test of the value of the mortgaged premises.

2. On such an inquiry, the court is not at liberty, in case the market value of the premises happens to exceed the sum realized at the sale, to deduct the market value and enter a decree only for the balance of the mortgage debt.

On petition, affidavits and order to show cause.*Mr. Thomas N. McCarter*, for petitioners.*Mr. James C. McDonald*, for complainant.

THE VICE-CHANCELLOR.

The principal object of the application now before the court is to have the decree for deficiency made in this cause so reduced, that the sum for which it stands shall represent, not the difference between the net proceeds of the mortgaged premises and the amount of the mortgage debt, but simply the difference between the market value of the mortgaged premises, at the time of the sale, and the mortgage debt. In other words, the petitioners insist that the court, in ascertaining the sum for which a decree for deficiency shall be made, may, in case the market value of the mortgaged premises is greater than the sum obtained for them at a judicial sale, disregard the test of value fixed by the sale, and deduct such sum from the mortgage debt, as it may, upon proof, adjudge to be their value, and limit its decree for deficiency to the balance.

The following summary will give all the material facts: The petitioners are John A. Blair, David Young and Roderick Byington. Young and Byington, together with one Robert V

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Leslie, in December, 1872, purchased of William V. Snyder, a tract of land at Woodside, Essex county, for which they agreed to pay \$19,875. On the conveyance of the land to them, they paid \$6,875 in cash, and in payment of the balance assumed the payment of a mortgage, previously executed by Snyder on the land, for \$13,000. Leslie subsequently conveyed his interest in the land to Blair, who assumed Leslie's liability for the mortgage debt. Snyder subsequently purchased the mortgage, and had it assigned to his wife (the complainant in this suit), who, at his instance, brought this suit to foreclose the equity of redemption in the mortgaged premises, by sale. The mortgaged premises were sold in December, 1879, under a final decree made in July, 1879, for \$4,500, leaving a deficiency of over \$10,000. The petitioners insist that at the time of the sale the mortgaged premises were worth at least \$11,000, and that the court should, therefore, in ascertaining the deficiency for which Mrs. Snyder is entitled to a decree, deduct \$11,000 from her mortgage debt, and enter a decree for the balance only.

In determining the question raised by this application, I shall regard Mr. Snyder as the complainant in this suit. That, I think, is his true position. He purchased the mortgage, and paid for it with his own money, ordered suit brought on it, and has since controlled the suit. By the agreement between Snyder and his grantees, they became principals in respect to the mortgage debt, and he their surety. By their assumption they became as effectually bound to him for the payment of the mortgage, in case the mortgaged premises were not sold for a sum sufficient to pay it, as though they had made a bond directly to him. No dispute is made as to their liability; the question is as to the extent of their liability.

The question presented is, in my judgment, entirely free from difficulty. This proposition seems to me to rest on authority which cannot be questioned, and to be also supported by the plainest considerations of justice. That sum for which property conveyed in pledge for the security of a debt is sold at judicial sale, must, so long as the sale stands, be taken, as between the parties to the suit, as a conclusive test of its value. This, as

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I understand it, is the rule presented by our statute. The seventh section of the chancery act directs "that it shall be lawful for the chancellor, in any suit for the foreclosure or sale of mortgaged premises, to decree the payment of any excess of the mortgage debt, *above the net proceeds of sale*, by any of the parties to such suit who may be liable, either at law or in equity, for the payment of the same." *Rev. 118*. The same rule was established by the courts long prior to the adoption of any statute on the subject. *Globe Insurance Co. v. Lansing*, 5 Cow. 338; *Lansing v. Goelet*, 9 Cow. 346. The opinion of Chancellor Jones, in the case last cited, contains a valuable summary of the adjudications bearing upon the question made prior to 1847. The law, I think, must be considered so firmly settled as to be beyond alteration by the courts.

When a bond and mortgage are given for the same debt, the bond is the evidence of the debt, and the mortgage is merely a security. The creditor may always pursue his remedy on the bond, regardless of the security afforded by his mortgage. The contract does not require him to resort to his security. Until his debt is paid or discharged, he is entitled to all remedies afforded by the law for its collection. If he desires to have his pledge converted into money, by judicial sale, and the money applied in discharge of his debt, he must proceed by bill of sale, and if the pledge is condemned to sale, the sale is made by the court. The court is really the vendor; the pledge is sold by its authority and under its process, and though the contract is in the form of a sale, with its officer, he acts merely as the agent of the court. For this reason the court exercises a more liberal supervision over such contracts than those of any other class. *McCahill v. Equitable Life Ins. Co.*, 11 C. E. Gr. 531; *Hayes v. Stiger*, 2 S. & Eq. 196. The court may compel a purchaser who purchases at a sale made under its process, to specifically perform his contract by proceedings in attachment. *Silver v. Campbell*, 10 C. E. Gr. 465; *Bowne v. Ritter*, 11 C. E. Gr. 456. If the pledge is for a sum greater than is required to pay the liens to which it is subject, the surplus is paid to the pledgor; if for less than the amount due to the pledgee, it is the duty of the court, accor

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to the well-established practice, to award him a decree for the deficiency. The price, however, realized at the sale, whether it be more or less than is required to pay the pledgor's debt, is the only known legal standard of value. The court cannot sell the pledge to the pledgee for one price, and make title to him for that price, and then, in adjusting the amount remaining due to him from his debtor, compel him to pay a much larger price. If such a thing could be done, it would amount to this: the court would nullify the sale so far as it affected the interests of the vendor, but compel the vendee to keep his part of the bargain, and to pay for the property a price he never agreed or consented to give. This court has no such power.

The soundness of the legal rule mainly relied on in support of this application is not open to discussion. It is this: that a surety is only entitled to recover of his principal to the extent that he is damnified. Re-imbursement is all that he can ask. If the creditor remits his debt, as a gratuity to the surety, the surety can recover nothing, for he has lost nothing. *Burge on Suretyship* 359. So if the surety extinguishes the debt for less than the whole sum due, he can only recover what he actually pays. *Bonney v. Seely*, 2 Wend. 481; *Reed v. Norris*, 2 Myl. & Cr. 362; *Butcher v. Churchill*, 14 Ves. 567. It is unquestionable that all that the surety in this case is entitled to, is re-imbursement, but in ascertaining what sum will reimburse him the net proceeds of sale must, for the reasons already stated, be taken as fixing unalterably the limit of deduction.

It is also true that a creditor who holds a pledge as security for his debt cannot have both his debt and the pledge. If a mortgagee, after obtaining a decree of strict foreclosure and taking possession, proceeds to collect his debt, the decree of foreclosure is *ipso facto* opened, and the debtor let in to redeem. *Osborne v. Tunis*, 1 Dutch. 633, 651. But when the pledge is converted into money by judicial sale, even if the creditor is the purchaser, it is not true that he has both debt and pledge. In that case the pledge is sold to pay the debt; the debt is satisfied to the extent of the money realized, but no further; the interest of both pledgee

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and pledgor passes by the sale, and the purchaser stands in right of a new title, founded upon the rights of both.

Nor did the purchase of the mortgaged premises by the mortgagee in this case, operate as an extinguishment of the debt. The effect of a purchase, by a mortgagee, of the equity of redemption in mortgaged premises, under a judgment at law, found for the mortgagee, is to secure the same debt secured by his mortgage. In such cases the mortgagee purchases only the equity of redemption, and of course he remains subject to such part of his mortgage debt as is not raised by the sale. Now, if in this condition of affairs, he were allowed to collect, out of other property of the mortgagor, such part of the debt as was not realized by the sale of the equity of redemption, he would get, not the equity of redemption, but the whole value of the land, and the mortgagor would thus be compelled to pay the same debt twice. To prevent this injustice, it has been held that a sale of the equity of redemption, by the means here mentioned, operates as an extinguishment of such part of the mortgage debt as is not paid by the sale. *Tice v. Annin*, 10 Ch. 125; *Woodruff's Exrs. v. Black*, Sax. 338; *Hart v. Hartshorne*, 1 Gr. Ch. 349. But it is obvious at a glance that it is not possible to apply this doctrine to the case under consideration. The two cases are so dissimilar in all their fundamental elements that it would be a waste of effort even to mention the prominent distinctions.

The petitioners are not entitled to any deduction from the mortgage debt beyond the net proceeds of sale.

The petitioners also ask that the sale may be set aside, and insist that a sale should never be allowed to stand if it appears that property worth \$11,000 has been sold for less than its value. The sale was fairly conducted, and seems to have been fair in all respects. The petitioners were present, either in person or by counsel; there is no pretence of accident, surprise or fraud, and there is no reason to suspect fraud or other evil practice. The property, it appears, was sold for the largest price that could be obtained for it, and there is nothing now before the court that will justify even a hope that, if it were put up again, a larger price could be obtained. Under these circumstances

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ay pity the petitioners in their misfortunes, but it is powerless help them. But the purchaser consents that the sale may be set aside conditionally. Under this consent, an order will be made that if the petitioners shall, within twenty days, enter into a stipulation, with sureties to be approved by the court, that the mortgaged premises shall be sold at second sale, for at least \$8,750, and shall also, within the same period, pay the costs and fees of the sale heretofore made, and the taxed costs of these proceedings, the sale shall be set aside and a new sale ordered, but if they fail to do so, within the time limited, their petition must be dismissed, with costs.

SUSAN KIP

v.

HENRY I. KIP.

1. Equity deals with equitable estates as though they were legal estates.
2. By the common law, when lands become vested, during coverture, in husband and wife, the husband is entitled to the exclusive use and possession of them during their joint lives.
3. This rule, so far as it excludes a wife, during coverture, from the enjoyment of property thus held, was abolished by the statute of 1852, securing to married women the use of their separate property.
4. A bill which fails to make a case, which if admitted or proved will entitle the complainant to a decree, must be held bad on general demurrer.

On demurrer.

Mr. W. F. Gaston and Mr. Gilbert Collins, for demurrant.

Mr. Thomas M. Moore and Mr. Joseph D. Bedle, for complainant.

THE VICE-CHANCELLOR.

This is a suit by a wife against her husband and others. The

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defendants demur, insisting that the bill shows no matter of equity entitling the complainant to relief.

The bill alleges that Henry I. Kip, the husband of the complainant, on the 12th day of October, 1859, conveyed several tracts of land to one William H. Van Vorst, upon certain trusts. These trusts were, that the trustee should permit the complainant and her husband, during their joint lives, and the survivor during his or her life, to possess and enjoy the lands, and to take their rents, issues and profits without liability to account; and on the death of the survivor that the lands should go to such persons as the husband might designate as his devisees by will or in case of his failure to make a will, then to his heirs at law. The complainant further alleges that she and her husband resided together on the lands so conveyed in trust, until the day of August, 1869, when her husband, of his own accord, and without notifying her of his intention, took up his abode with his daughter Agnes, a child by a former wife, with whom he continued to reside ever since. The complainant, in the meantime, has lived in the dwelling on the trust property, where she and her husband resided together prior to their separation. The bill further alleges that the complainant's husband, since their separation, has, in connection with his daughter and her husband, executed three deeds, purporting to convey portions of the trust property in fee, for an aggregate consideration, as shown by the deeds, of \$40,840, and that the grantees have entered into possession of the lands so conveyed. The bill also alleges that another portion of the trust property has been conveyed by the complainant's husband alone, by deed purporting to convey a certain tract of land, and that he received as consideration therefor, the sum of \$3,300. The bill then avers that the complainant's husband, on the day of April, 1873, sold the timber from a portion of the trust property, for the sum of \$2,000, and that the timber has since been cut and removed. The complainant further says that since her husband separated himself from her, he has neither paid nor furnished her any money, and has contributed nothing to support except some groceries and other necessities, amounting in the whole to about \$325.

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This is the case made by the bill. Upon these facts the complainant insists that she is entitled to one-half of the interest or income of the consideration-moneys received by her husband, and to that end an account should be ordered; and she also contends that it is the duty of the court, for her protection and security, to take possession of the consideration-moneys received by her husband and invest them, in order that she may hereafter receive her fair share of their earnings.

The rights in dispute are purely equitable, but here they must be treated as though they were legal rights. Courts of equity treat trust estates as though they were legal estates, and deal with them as having the same incidents, properties and consequences that belong to like estates at law. In equity they are alienable, devisable, and descendible in the same manner as legal estates. In dealing with them, equity follows the law. *Cushing v. Blake*, 3 Stew. Eq. 689.

On the argument, the ground mainly relied on by the demurrants was, that during the joint lives of these parties, the husband is entitled to the whole use and benefit of the estate in controversy, to the exclusion of his wife, and she has no right, therefore, to require him to account, or to compel him to share with her anything he may have received. That, undoubtedly, is the rule of the common law. When an estate in lands becomes vested, during coverture, in husband and wife, the husband is entitled to the exclusive possession and use of it during their joint lives. They are each and both seized of the entirety—*per tout et non per my*; and as the existence of the wife, by the common law, is merged in that of her husband, he is the only person, in the eye of the law, who can possess or deal with it. For this reason it has been adjudged that during their joint lives the wife has no interest in or control over an estate thus held. *Wyckoff v. Gardner*, Spen. 556; *Washburn v. Burns*, 5 Vr. 18; *Bolles v. State Trust Co.*, 12 C. E. Gr. 308. But the chancellor has recently, sitting as ordinary, held that the statute of 1852, securing to married women the use of their separate property, abolished this rule of the common law, so far as it excludes the wife, during coverture, from the enjoyment of property thus held.

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See v. Zabriskie, 1 Stew. Eq. 422. Like effect, it is said, has been given to similar statutes by the courts of Pennsylvania and Indiana. *Freeman on Partition* § 75. The adjudication in *L v. Zabriskie* must rule this case. I therefore hold that the complainant has a sufficient present interest in the property mentioned in the bill to entitle her to maintain this action, if the bill, in other respects, exhibits a good cause of action.

But conceding that the complainant has a right to the immediate enjoyment of the lands held in trust, and that her estate in all respects, equal with that of her husband, still, I am unable to find, in the facts exhibited by her bill, any ground upon which relief can be given to her. This allegation constitutes the very marrow of her grievance: that her husband has, by deeds which purport to convey a fee, conveyed lands in which she has an estate equal with his, and has received the purchase-money thereof. But how does that harm her? His deed cannot convey or touch her estate. Even if he and she held the legal title to these lands, his deed would be utterly impotent to convey or impair her rights. In fact, his deed can have no more effect upon her rights than the deed of a stranger. While she lives and is of sound mind, nothing short of a written instrument signed by her, will pass her estate. These propositions need no demonstration.

The bill also alleges that the grantees of the husband, about the date of their respective deeds, took possession of the lands conveyed to each, and have since then held the exclusive possession thereof. The grantees are not parties to this suit. It would not, therefore, be proper to decide, in this suit, whether a simple allegation that the grantees have held exclusive possession, without more, is sufficient, as an averment of an ouster, to entitle the complainant to maintain an action against them. As at present framed, the bill makes a case against the husband's grantees, against anybody, but not against him. He cannot be held liable for the wrongs of his grantees.

The nearest approach the bill makes to the specification of a cause of action is found in the averment respecting the sale and removal of timber; but this, I think, is much too vague and uncertain

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afford sufficient foundation for a decree. This averment charges **that** Henry I. Kip, on the 1st day of April, 1873, sold the timber **on a** portion of the lands held in trust, to a person whose name is **unk**nown to the complainant, for the sum of \$2,000, and upwards, **as t**he complainant has been informed, and that the timber has **since** been cut and removed. Whether or not the sale was carried **into** effect, or who cut and removed the timber, the bill, it will **be o**bserved, does not inform us. It does not assert that the **defendant** or his purchaser cut and removed it, nor that the **defendant** received the money for which it was sold. For any-**thing** shown by the bill, the complainant herself may have cut and removed the timber. If every fact here alleged were proved or admitted, no case would be made against the defendant. In order to make a case against him, the complainant would be required to go one step further by her proofs than she has gone in her pleading. She would be required to prove a material fact not alleged in her bill, namely, that the defendant had removed the timber. A complainant must state his grievance, and also his right or title to relief, with accuracy and clearness. *Story's Eq. Pl. § 241.* He must make a case by his bill, which, if admitted or proved, will entitle him to a decree. *1 Dan. Ch. Pr. § 61.*

The demurer must be sustained, with costs.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY,

OCTOBER TERM, 1880.

THEODORE RUNYON, ESQ., ORDINARY.

In the matter of the propounding for probate of a paper writing purporting to be the last will and testament of JOSEPH L. LEWIS, deceased, late of Hoboken, and a paper purporting to be a codicil thereto.

A testator was eighty-two years old in 1873, when he made his will.—*Held*, that if it be conceded that he was miserly, squalid, dishonest, profane and irascible; that he canceled a codicil to his will merely because he believed the beneficiary named therein, who was not a relation, was insincere towards him; that, in 1860, he revoked a trust deed in the nature of a testamentary disposition of his property (it appearing that he believed that he had, by its provisions, retained power to do so); that, in 1867, he revoked an absolute gift of certain stocks; and that he gave the bulk of his estate to his executors in trust to reduce the debt incurred by the United States in subduing the rebellion—he having no legitimate kindred who might, by the creation and execution of such trust, be disinherited or disappointed in their natural expectations—those things did not establish testamentary incapacity.

Mr. Robert Gilchrist, for the proponents.

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Mr. A. Q. Keasbey, Mr. Cortlandt Parker and Mr. Edwards Pierrepont, of New York, for the United States.

Mr. John P. Stockton, attorney-general, for the state of New Jersey.

Mr. B. Williamson and Mr. Russel, of New York, for John S. Cathcart and others.

Mr. J. C. Besson, for Jessie Benson and her children.

Mr. M. W. Niven, for the overseer of the poor of Hoboken.

Mr. Gilhooly and Mr. Perry, of New York, for Thomas Lewis and the children of Mary Lewis.

THE ORDINARY.

The testator, Joseph L. Lewis, then of Hoboken, in this state, died March 5th, 1877, aged about eighty-six years. On the 1st of October, 1873, he executed, in Jersey City, in the office of Messrs. Gilchrist & McGill, a law firm then existing, of high standing, an instrument of writing of that date, purporting to be his last will and testament. It was executed in the presence of three witnesses, with all due legal formalities. By it he provided first for the payment of his debts and funeral expenses, and then gave as follows: To John, Lewis, Margaret and Joshua J. Benson, children of his friend, Joshua Benson, of Hoboken, as a memorial of his regard and esteem, the house and lot in Hoboken where he then resided (described in the will as on the westerly side of Bloomfield street, and known as No. 326, and as the same conveyed to

NOTE.—For constructions of gifts and devises for the benefit of the country, or for the payment of the national debt, see *Newland v. Att'y-Gen.*, 3 *Meriv.* 684; *Nightingale v. Goulburn*, 5 *Hare* 484, 2 *Phil.* 594; *Ashton v. Langdale*, 15 *Jur.* 868; *United States v. Fox*, 52 *N. Y.* 530, 94 *U. S.* 315; *Dickson v. United States*, 125 *Mass.* 311.

For gifts to the government or state as trustee, see *Mitford v. Reynolds*, 1 *Phil.* 185; *Levy v. Levy*, 33 *N. Y.* 99; *Att'y-Gen. v. Baker*, 9 *Rich. Eq.* 521.

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him by William Machold and wife), and to the survivors and survivor of them, for life; the property, at the death of the survivor, to go to his or her issue in fee, and if no issue, then to his or her heir or heirs at law. To Benson and his wife each one-half of a bond and mortgage, the former made by Benson and his wife and mother, and the latter given by Benson and his wife and mother, on the house in which Benson resided in Hoboken, known as No. 328 Bloomfield street, with all the money due and to become due thereon, and which, at the testator's death, should remain unpaid, with the mortgaged premises. To Magdalene J. Johnson, of Falmouth, in Jamaica, \$10,000, to be paid to her as follows: \$500 every six months for the first three years after his death; \$3,500 at the end of the fourth year, and the remaining \$3,500 at the end of the fifth year; and he requested that she would pay to her aged aunt, Frances Grace, \$300 a year, in equal quarterly payments, so long as the latter should live. To Marianne, Hermann, Lewis and Lily Batjer, children of his friend Hermann Batjer, of the city of New York, by his deceased wife Marianne, each \$1,000, and directed that those sums of money should be paid by his executors to Hermann Batjer in trust, to invest them for the children in United States bonds, or stocks of the state of New York, and apply the interest thereof to the maintenance and support of the children, or accumulate and capitalize the interest for them, as he should see fit, and pay to each of them, when he or she should reach the age of twenty-one years, his or her \$1,000, and the interest thereon capitalized. To Jennie Hatfield, daughter of his friend, Gen. James T. Hatfield, \$1,000, to be paid to her father by his executors, on a similar trust for her as that declared in reference to the gift to the children of Mr. Batjer. To Nellie, Madeline and John Lewis, children of his friend, John S. Harberger, of the city of New York, \$5,000, to be divided between them equally; and he directed that the money be paid to their father, on a similar trust for them. To Margaret Wolfe, daughter of his friend, John Wolfe, of the city of New York, \$5,000, to be paid to her father on a similar trust for her. To his long-tried and faithful friend, George D. H. Gillespie, of the city of New York, \$10,000.

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To his executors, \$5,000 in trust, to pay that sum over to the trustees of the Five Points House of Industry, in the city of New York (incorporated in 1854), or to its treasurer for the time being, to be applied to the uses thereof. To his executors, \$500 on the like trust, for the Woman's Hospital of the City of New York. He then directed and enjoined his executors and their successors in the execution of his will and the administration of his estate, to set apart from his estate \$2,000, and invest the money in United States bonds or New York state stocks, and keep it permanently invested in good securities, and use the interest, and so much of the principal as might be necessary, in keeping his burial-ground in Greenwood cemetery, and the vault therein, in perfect order and repair, renovating the vault when necessary; and he directed that if it should not be necessary at any time to use all the interest for that purpose, the surplus interest should be capitalized and kept invested in like manner as the principal sum, and be applied to the same purpose. He next made the following bequests of keepsakes:

“First. To my friend, James M. Morrison, president of the Manhattan Bank, New York city, my gold duplex watch, numbered 8,468, made by Cooper, London (to mark the vigils kept by him over the pet lamb).

“Second. To John Wolfe, his choice of my two line-engraved pictures, *La Maddalena del Corregio*, by Longhi, 1809, proof impress; and a picture of *Venus* by Titian, engraved by Pound.

“Third. To George D. H. Gillespie, a line-engraved picture, ‘*Ora Sesta de Notte*,’ from a painting by Rafael, by Tomas, 1806; also, my large engraved picture, ‘*Weighing the Deer*,’ from a painting by Fred. Taylor, engraved by Atkinson.

“Fourth. To John S. Harberger, the duplicate engraved picture, ‘*La Maddalena del Corregio*,’ proof, 1809; also, a large engraved picture of *Rome*; also, a book, *Encyclopædia of Gardening*, by J. C. Loudon, London, 1827.

“Fifth. To Robert Elder, my best fishing-rod, agate-mounted guides, and German-silver reel to match; and a book, *Izaak Walton's Complete Angler*, plates, Bagster's edition, London.

“Sixth. To Maggie Benson, daughter of Joshua Benson, my Oxford edition of the Holy Bible, and my New York edition of the Book of Common Prayer, to match.

“Seventh. To Jennie Hatfield, in this my will before mentioned, my diamond brooch, the design of which is a rose flower, and a book entitled ‘*Milton's Paradise Lost*,’ two vols., plates, London edition, 1816.

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“ *Eighth.* To Joshua Benson, my hunting-knife, with rifle pistol attached ; also, an engraved picture, ‘Castle of Heidelberg ;’ also, a book entitled *Health, Diet and Regimen*, by Dr. Graham, London, 1842 ; also, Col. Lawker on ‘Shooting,’ plates, London ed., 1830 ; also, all my household furniture not specifically bequeathed.

“ *Ninth.* To John Benson, my case of Colt’s revolving pistols, made for me to go to the war of 1861.

“ *Tenth.* To Lewis Benson, my case of pistols with barrels one inch long, but nevertheless effective ; also my salmon and trout fishing-rod, with reels to match, flies, &c.

“ *Eleventh.* To my friend Robert Gilchrist, now attorney-general of the state of New Jersey, my Pompeii ring (monogramic), embracing the portraits of Socrates, Sappho and Plato, obtained by me at Pompeii, Italy, in 1833 ; and also an autograph letter from Thomas Jefferson, author of the Declaration of American Independence, dated at Monticello, October 10th, 1824, to Joseph L. Lewis, No. 3 Wall street, New York.”

He then gave, devised and bequeathed all the rest, residue and remainder of his estate, real and personal, and of every kind whatever, of which he might die seized and possessed, and to which he might at his death be entitled, to his executors in trust, to expend and apply it in reducing the national debt of the United States of America, contracted in the cause of the rebellion of 1861 ; and he provided that in the execution of that trust his executors, as trustees, might use their discretion as to the manner of applying the residue and remainder to the reduction of the debt, but he strictly enjoined them that they should personally superintend the application of it, that there might be as little waste of it as possible, and that it might not be diverted to other uses by dishonest officials ; and, lastly, he appointed his friends George D. H. Gillespie and John Wolfe, executors of his will, exempting them from all accountability for any diminution in the value of his estate ; real and personal, by reason of the failure or decrease in value of any of the securities in which it might be invested, or by reason of the failure or decrease in value of any securities in which they might invest it, or any part of it ; provided, that at the time of the investment by them the securities in which they invest appear reasonably good to an ordinarily-careful man ; and he thereby revoked all former wills.

On the 5th of June, 1875, at the same place, in the presence

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of three witnesses, the testator executed, with due formality, a codicil of that date to the will, by which he ratified and confirmed the will, except so far as any part thereof should be revoked thereby, and he thereby revoked the gifts to Joshua Benson and his wife and children, directing that the subjects of the revoked devises and bequests fall into the residue of his estate and be disposed of accordingly by the will.

The will and codicil are propounded for probate by Messrs. Gillespie and Wolfe, the executors, and the admission of them to probate is opposed by John S. Cathcart and others, claiming to be collateral blood relations of the testator, the state of New Jersey, the overseer of the poor of the city of Hoboken, and Thomas Lewis, and the children of his sister Martha, claiming to be lineal descendants, the former the son, and the latter the grandchildren of the testator, and the admission of the codicil to probate is opposed by Jessie, wife of Joshua Benson, and their children. Jane H. Lewis, who claimed to be the testator's widow, and opposed the will and codicil, withdrew from the contest before the hearing. As before stated, the instruments in question were executed with all due legal formalities. The testamentary witnesses were satisfied that the testator had testamentary capacity at the time. From the testimony of Mr. McGill, by whom the will and codicil were drawn, and who had been acquainted with the testator for five or six years before the will was drawn, and had occasionally transacted legal business for him, it is evident that the testator had full capacity in every respect. He says the testator appeared to thoroughly comprehend the act he was doing; that he appeared to be of sound and disposing mind, and of good memory; that the testator gave more consideration and thought to the making of the will than he (Mr. McGill) thought necessary; that ten days or two weeks, or perhaps more, before the will was made, the testator told him that he desired to have him draw his will; that it was a matter about which he wished him to exercise the greatest care; that he desired to have the instrument so drawn that it could not be broken, and that he wished him to give him the skeleton of a will—that is, the formal commencement, the words with which

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execution of the codicil (he drew that also) the testator was perfectly aware of the act he was doing, and appeared to be of sound and disposing mind and of good memory. He says he saw the testator, and conversed with him frequently between the time of the execution of the will and the time of executing the codicil. The testator appears to have communicated to him his reason for the change made by the codicil, and also the reason for the provision for Benson and his family in the will which it was the testator's design by the codicil to annul, and for which purpose the codicil was executed. The reason for the provision in the will was that Benson had been very kind to the testator, and the reason for making the codicil was that the testator had become, after the making of the will, dissatisfied with Benson's conduct towards him. The particular cause of the change of purpose was, as the testator stated to Mr. McGill, that the testator was convinced that Benson had dealt unfairly with him in regard to money due to him from Benson, and felt satisfied that Benson's attention to him was insincere, and arose from a merely mercenary motive, the expectation of obtaining substantial valuable remembrance by the testator in the distribution of his property by will. There would seem to be no ground for questioning the testator's capacity to make a testamentary distribution of his property, so thoroughly does he, by the testimony of the subscribing witnesses, and the internal evidence of the will itself, appear to have been possessed of all the legal requisites to such an act.

It is urged, however, on the part of the contestants, that he was a kleptomaniac, exhibiting a propensity to pilfer in the larceny of articles of very insignificant value; that he became, towards the close of his life, very parsimonious; that he endeavored to defraud the persons entitled to the estate of one who had been his faithful servant; that he made unfounded charges of theft of his property against a person in his employ in his house; that he used profane language and was unclean and careless in his habits of life; that he was oblivious of the fact that in July, 1858, he had disposed of his property by a deed of trust; that he was under a delusion as to a gift of \$10,000 which he made to John S. Cathcart in 1861; the alleged delusion consisting in

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his conviction that the gift was in trust, while it was, as the contestants allege, in fact absolute and for Cathcart's sole benefit; and that he labored under other delusions as to the malign intentions of others towards him, to do him mortal injury; and it is urged that these things connected with the fact that, almost entirely ignoring his relations, he gave the great body of his large fortune to be used in paying the debt of the United States incurred by reason of the rebellion of 1861, taken all together, show a mind deranged and deprived of the requisites of testamentary capacity. Miserly disposition and habits, unclean modes of life, dishonesty, even to theft, profanity and violence of temper, of themselves do not affect the claim to testamentary capacity; for obviously, a man may be a thief, a miser, unclean, profane and of ungovernable temper, and yet have testamentary capacity. But it is argued that where, as it is insisted it was in this case, they are found where they did not previously exist, they indicate mental derangement, and are the evidences of a want of the qualifications which go to make up testamentary capacity. But if it be conceded that all that is claimed by the caveators on this head has been proved (a concession which it would be by no means just to make), the facts show no want of capacity. The testator spent his life in the accumulation of property, and up to his death was devoted to the acquisition of wealth. He was never married and had no relations with whom he associated. Indeed, it is alleged, and all the evidence in the cause on the subject is in that direction, that he was of illegitimate birth, the son of a West Indian woman of African descent. When his circumstances are considered, it would not have been surprising if his old age had presented such characteristics as are imputed. It is most manifest, however, from the testimony of Mr. McGill and others, that when he made the will and codicil he was possessed not only of testamentary capacity to the requisite extent to enable him to dispose of his property by will, but of a shrewd and discerning, firm, self-reliant and self-asserting mind and disposition. He knew what property he had, and he selected with great care and discrimination the objects of his bounty.

It is insisted on the part of the Bensons that he labored under

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a delusion as to Benson when he made the codicil. When he made the will he believed in the disinterestedness of Benson's service to him and had complete confidence in his integrity, and hence the provision for him and his in that instrument. But after the making of the will he became convinced that Benson was not only insincere, but that he had dealt unfairly with him, or had intended to do so, and hence the change. Benson says the change of disposition towards him arose from the fact that he had pinned a duplicate, unsigned receipt, purporting to be from the testator to him for money receipted for by the testator, on the bond of Benson and his mother held by the testator. It is difficult to understand why Benson attached the unsigned receipt to the bond, and, on the other hand, perhaps the testator was not warranted in a conclusion unfavorable to Benson's integrity from the circumstance. But there may have been other reasons which were not communicated to Benson. Mr. McGill says the testator gave, as his reason for the change of intention towards Benson, that the latter would not pay him what he owed him, and made unfounded excuses for his default in payment. But whatever may have been the occasion of the change, it was not, it is admitted, without a reason; and if the testator had causelessly and of the merest caprice changed his intentions towards Benson in a matter of testamentary bounty, the fact could have no weight against the validity of the will or codicil. Of course, it could in no case have any against the former, for it is the codicil which evidences the change of intention; the will, it is claimed, was right, and it is not alleged that the testator was under any delusion as to Benson when that was made. It is to be remembered that Benson was not a relation of the testator, and therefore had no claim on his estate from kinship. His expectation of a gift by the will was based on his claim for compensation for services rendered to the testator in a business way.

Nor is there any evidence of delusion in regard to the trust deed before referred to, by which disposition of the testator's property, to take effect after his death, was made. He, in fact, revoked the deed. It is dated in July, 1858, and his receipt to the trustee for the property is dated in December, 1860. The

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ument was evidently (and is proved to have been) of a testatory character, designed to insure a disposition of his estate at his death, without the cost of protracted litigation. It contained the following initial provision in the declaration of the testator:

"To take possession of and hold all and singular the personal estate above mentioned, during the term of my natural life, subject to my written order and disposition thereof, or any part thereof; and to collect all dividends, interest and income arising therefrom, and to pay the same to me or to my order, from time to time, as the same are collected."

and then follow the provisions which were to take effect after death. It will be seen that the instrument provides that the assets were to be held during his life, "subject to his written order and disposition." This he undoubtedly understood to give him a power of revocation. In *Forshaw v. Welsby*, 30 Beav. 243, a voluntary settlement made by one *in extremis* on his family, and retaining no power of revocation on his recovery, was set aside on his application, on the ground that it was not executed with the intention that it should be operative in case of his recovery from his illness. See, also, *Garnsey v. Mundy*, 9 C. E. 243, and cases there cited. The testator believed that he had power to revoke the trust, and that he had effectually done so.

Whether he had such power or not is a question of law. Whether the trust, if it exists, prevents the operation of the gift as to any of the testator's property, is a matter which does not enter into the consideration of the question now before me, and can have no influence in determining whether the testator had testamentary capacity.

The testator, in 1861, gave to John S. Cathcart one hundred shares of stock, and subsequently required him to return the proceeds thereof to him, alleging that the property was given on a trust for the benefit of others. The testator, after the gift was made, became dissatisfied with Cathcart's action, and alleging him to be chargeable with a gross dereliction of duty as trustee of the trust, demanded the return to him of the fund. Cathcart acceded to and complied with the demand. He, it is true, admitted the existence of the trust, declaring that the gift was un-

... demand, and ... mind. ... absolute, is ... dated Sep- ... him to hand ... the testator's giving ... memorandum ... a special pur- ... also, leading ... a trust for the ... said to have been ... and Cathcart. ... as Cathcart ... that of an ... afterwards cause- ... returned by the ... say that it pre- ...

... very large, and by ... of aiding in ... rebellion, evidence ... have been judi- ... *Here 484; S. C. ... Trusts 14, 15; T. ... 4 Ves. 227; H. ... see 2 Story's Eq. J. ...* The question, however, is not whether a gift to such a charity will be upheld, but whether the fact that the testator makes such a bequest is evidence of a disordered intellect and of testamentary incapacity. It obviously is not. It is urged, however, that the fact of the making of such a gift is in this case, connected with the disinheriting of all, or the great part, of those who had a right to expect to be the recipients of the testator's bounty, and is therefore indicative of incompetency. But it does not appear that the testator had any legitimate kindred. As before stated, he never married. Though a very large amount of testimony was taken in the cause, and the estate

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subjected to very great expense in resisting the claim of one who alleged that she was his widow, the claim was at length shown and admitted to be entirely fraudulent, and the result of a criminal conspiracy. Although the opportunity has been afforded to prove that the testator had legitimate relations, no such proof was offered; and the omission is the more significant because, in the outset of the cause, the illegitimacy of the testator was alleged, and evidence taken to establish the fact. Though the testator called the contestant, John S. Cathcart, his nephew, and addressed him as such in epistolary correspondence (and perhaps otherwise), he subsequently denied the relationship, saying that John S. Cathcart and his brother Martin were not his nephews, "except by courtesy." That the testator was attached to the government of this country, and sympathized deeply with it in the crisis of the rebellion, there is ample evidence. He was minded to offer it his personal service as a soldier; and when he yielded, as he readily did, to the suggestion that his age unfitted him for such service, he expressed his determination to aid the government with his pecuniary means, and he accordingly subscribed to its loans at a period when, to some people, such action appeared more patriotic than prudent. It is not surprising that, in his circumstances and with his devotion to the country, he should have been desirous of offering to it the fortune which, under its beneficent institutions, he had been enabled, by his industry, thrift and sagacity, to accumulate. Such gifts are the offspring of lofty sentiments, not of disordered imaginations. James Smithson limited his estate over to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men, and the gift was carried into effect. A late distinguished citizen of this state gave, by his will, to the state a marine battery which he had in course of construction, and directed that it be completed at an expense not to exceed \$1,000,000, out of his estate, before it should be offered to the state for its acceptance. His testamentary capacity was never questioned. In the case in hand, it is not at all improbable that the enthusiasm of the testator for the cause of the Union

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was kindled by the fact that the interests of the colored race here were involved in the struggle which arose out of the rebellion, and that his gratitude was excited by the liberation which was one of the results of the contest. But apart from these considerations, obviously no conclusion unfavorable to his capacity is to be drawn from the fact that a testator gives his estate in charity, ignoring his collateral relations. It appears, however, by the will, that the testator was not, in fact, unmindful of his blood relations. He made such provision as he deemed proper for such of them as he desired to provide for. He gave to Magdalene J. Johnson \$10,000, with a request that she would pay to her aged aunt, Frances Grace, for life, \$300 a year in equal quarter-yearly payments. The testator, for years before the making of the will, was not friendly to the Cathcarts. If he had no legitimate relations (and he does not appear to have had any), those of the contestants who claim to be his relations could derive no advantage from refusing probate of the will. If the will of 1861 made provision for his relations, that will was canceled by the testator in 1872. Benson would be benefited if probate of the codicil were denied, provided probate of the will were granted, but not otherwise. While the evidence produced in opposition to the will and codicil, fails to show that the testator was not possessed of testamentary capacity, the testimony of numerous witnesses (before adverted to), business men who knew him well up to the time of his death, and whose opportunities of knowledge were excellent, abundantly establishes his competency.

Among those witnesses is John S. Harberger, president of the Manhattan Company, a bank of the city of New York, who was acquainted with him from about 1845 up to the time of his death, and knew him well. He says of him :

“As a business man, I have never met with a sounder head, and if you like, (judging) from the care and caution that he invariably exercised in the choice of securities, [having regard to] the price and the revenue to be derived from them; he was a man of strong attachments, and, I might say, of equally strong antipathies (I believe, in the course of my intercourse with him, I never challenged his antipathies); apparently an exacting man, yet I think he never asked me to do anything that was not reasonably just and proper.”

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He further says that the testator was a man of very strong character—one of the most marked men in character that he ever met in his life; of iron will and inflexible, and almost equally inflexible in his prejudices; naturally suspicious; and, he adds, he was prudent to a fault, except where his antipathies sometimes might, for the moment, disturb his better judgment. He also says that there was not a moment during all his long acquaintance with him in which he showed a lack of understanding or any unsoundness of mind. Mr. Harberger was assistant cashier of the bank from 1857 to 1860, and cashier from the latter date to September, 1879, when he became president. As before stated, his acquaintance with the testator commenced in 1845, and continued up to the time of the death of the latter. He says he saw a good deal of him; that as early as 1845, the testator was the holder of New York city stocks; that his transfer office was that bank, in which the witness paid him interest, as a dealer and stockholder of the bank, for the twenty-five years before his death, and that the testator was one of the depositors of the bank up to the time of his death, and he was occasionally a borrower from the bank; that the witness was accustomed to deal with him personally up to his death, and to talk with him about his business affairs, such as the nature of his investments, the rate of interest for money, and other topics of interest to both of them at the time; that the testator's investments were generally of the best in the market, ordinarily those that paid the highest rate of interest and were most highly esteemed by the majority of investors, and that the investments were selected by the testator himself. Mr. Harberger was on terms of intimate acquaintanceship with him, and saw and conversed with him, on an average, at least twice a week during the last two years of the testator's life, and received a good many letters from him, and altogether had an excellent opportunity of knowing his mental capacity. It appears from the testimony that in his business transactions up to his death, the testator exhibited no evidence of unsoundness. The burden of proof of incapacity is on the opponents of the will. They have by no means established it. On the contrary, it appears, from a care-

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ful review and consideration of all the evidence, that the testator, at the time of making both will and codicil, was possessed of full testamentary capacity.

Those instruments will be admitted to probate.

Matter of the estate of PETER G. DOREMUS, deceased.

An order of distribution of an estate was made in December, 1867. One distributee was absent, and, on the presumption of his death, his next of kin applied for his share, but the administrator refused to pay it over, and no compulsory proceedings were taken against him. The administrator retained the share ready for payment until April, 1877, when he deposited it in a savings bank, where it drew six per cent. interest. Shortly afterwards, he withdrew and applied it all to his own use. The distributee appeared in 1878, and proceedings against the administrator's sureties—*Held*, that they must pay interest on the share at six per cent., after and during its deposit, and at seven per cent. (the legal rate) from the time of its withdrawal until July 4th, 1878, and at six per cent. (the legal rate from that time) subsequently.

Mr. W. Prall, for the distributee.

Mr. T. D. Hoxsey, for the sureties of the administrator.

THE ORDINARY.

Upon an assessment of the damages upon an administrator's bond, the question is raised as to the amount of interest which shall be collected on an unpaid distributive share of the estate which is the only outstanding obligation secured by the bond. The order of distribution was made in December term, 1867. The administrator appears, by the testimony, to have kept the money for the share in question either in his own custody at home or on deposit in bank, ready to be paid over, up to the time, April 20th, 1877, when he deposited it in a savings bank in Paterson, where it drew interest at the rate of six per cent. per annum. He drew part of the money out of that bank N

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vember 30th, 1877, part of it April 1st, 1878, and the rest on the 5th of that month, and applied all of it to his own use. He is chargeable with interest from the time when he made the deposit in the savings bank, at six per cent. per annum, up to the time of drawing it out; at seven from that time up to the 4th of July, 1878, and at six per cent. from that date. It appears that the distributee to whom the share belonged, and to whom the administrator was, by the order of the orphans court, directed to pay it, did not appear until within the last two years, and it was alleged by his next of kin that he was dead. They applied to the administrator for the payment of the money to them as next of kin, and threatened him with legal proceedings for the recovery of it. He refused to pay it over to them, however, but held it ready to be paid to the person or persons entitled to it. No proceedings were ever taken against him to recover the money by those who claimed it as next of kin.

EZEKIEL I. TUCKER, executor of Warner Tucker, deceased,
appellant,

v.

UZAL A. TUCKER et al., respondents.

1. An executor has no right, without authority from a competent court, to invest the funds of the estate in municipal bonds or bank stock.

2. Where commissions are paid on part of the estate at an intermediate accounting, commissions can only be allowed on the amount which comes into the executor's hands afterwards, and such commissions are calculated as if the subsequent receipts were part of the prior receipts.

Appeal from decree of orphans court of Union county, on the account of the appellant.

Mr. E. Q. Keasbey, for appellant.

Mr. Luther Shafer, for respondents.

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THE ORDINARY.

The following questions were presented on the argument this appeal: Whether certain investments made by the executor, the accountant, of the money of the estate in bonds of the city of Elizabeth and in bank stock, should be allowed; whether, if the investment in bank stock be disallowed, he should have allowance of the tax paid by him thereon; whether he should be allowed interest paid by him on taxes assessed on the property of the estate, and whether he is entitled to full commissions on the whole estate, seeing that he was allowed such commissions on a part of the estate in his intermediate account.

The orphans court disallowed the investments, and, while charged him with the dividends which, by the account, he acknowledged he had received from the stock, disallowed the tax he had paid on the stock. It also disallowed the interest paid by him on taxes assessed on the property of the estate. At the close of his account the executor states that the securities, investments and assets of the estate consist of fifty shares of bank stock, eight bonds, of \$1,000 each, of the city of Elizabeth, and certain real estate, which was obtained on an exchange. That real estate was properly specifically accounted for, as part of the estate, in accordance with the decision of this court in *Tucker v. Tucker*, 10 Stew. Eq. 286. The executor had no authority to invest any part of the estate in either municipal bonds or bank stock. According to his own testimony, he did not consult any of the legatees or devisees on the subject, nor mention the matter to them until after the investments were made. He bought the bonds from the city comptroller at less than par—ninety-eight cents on a dollar, and accrued interest. In about four weeks after he bought them, all of the legatees and devisees, he says, made complaint to him about the investment. He told them he considered the bonds good, and one of them said that legal counsel in the city (whom he named) advised that he get rid of them, but he refused to follow the advice or heed the complaint. He had no authority from the orphans court to invest. The investments in city bonds and bank stock cannot be allowed. N

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of them is an investment recognized as proper for trust moneys in the absence of direction by competent authority. The municipal bonds in this case were, it will be noticed, bought of a city official and below par. Objectionable as these bonds have proved to be as an investment (they pay no interest, and now bring but forty or fifty cents on the dollar in the market), there are other municipal bonds, issued by competent authority, in this state, which would, perhaps, have been more so still. It is easy to see that to sanction the unauthorized investment of trust money by a trustee in municipal bonds would be a most unwise proceeding. Such investments have not been authorized by the court of chancery in this state. The rule on the subject of investments of trust money has been referred to in several cases. In *Gray v. Fox*, Saxt. 259, and *Vreeland v. Vreeland*, 1 C. E. Gr. 512, the court recognizes only government stocks and landed security, and condemns investments in stocks of private companies. In *Halsted v. Meeker*, 3 C. E. Gr. 136, and *Lathrop v. Smalley*, 8 C. E. Gr. 192, direction was given to trustees, and what were allowable investments was stated. They were declared to be securities of the United States or of this state and mortgages of real estate.

By our statute law (*Rev. 777 § 115*), executors, guardians and trustees may obtain the direction of the orphans court as to their investments, and if they follow it the loss which may be sustained will not fall on them. The act does not limit the court as to securities. It expressly authorizes executors, guardians and trustees to invest in the bonds of this state.

The executor in this case left the taxes on property of the estate unpaid, as he says, for two, three and perhaps four years, and paid interest on them at the rate of twelve or fifteen per cent. It does not appear that he was not in funds of the estate wherewith to pay them, but the contrary. The interest was properly disallowed.

He complains that the court, while charging him with the dividends received from the bank stock before mentioned, refused to allow him the amount paid by him for tax assessed on him for it. He charges himself with \$225 received for divi-

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dends on the stock up to July 1st, 1878. He bought it April 1st, 1878. The court, in restating the account, appear to have charged him with lawful interest on the amount of the par value of the stock, \$5,000, up to the time of filing the account, November 18th, 1878, and also with the amount by which the dividends above mentioned (up to July 1st, 1878), exceeded that interest. But the executor does not charge himself with any dividends on the stock after July 1st, 1878. It appears, by the restatement of the account, that the stock paid a dividend of eight per cent. per annum, though there is no evidence on that head, and it is impossible, from the record, to say what dividend he, in fact, received or was entitled to on the stock up to the filing of the account. It is certain, however, that he is not charged with dividends after July 1st, 1878. It does not appear, therefore, that in view of the fact that the dividends on the stock probably exceeded the legal rate of interest on its par value, the disallowance of the tax paid by him was unjust to him. If he had been charged with all the dividends received, and they had exceeded or had been equal to the legal rate of interest on the par value of the stock, for the year for which the tax was paid after deducting the tax, he should have been credited with the tax. But, as the case stands, the decree must be affirmed in that respect also.

He claims allowance, upon his final account, of full commissions on the entire estate in his hands, although he was allowed such commissions on by far the greater part of it on the settlement of his intermediate account. He is entitled to commissions only on the money which has come into his hands since the settlement of the intermediate account, and the commissions on this sum are to be allowed at the rate at which they would have been allowed if it had constituted part of the amount on which commissions were allowed on the settlement of the intermediate account.

An executor, administrator, guardian or trustee is not entitled under the statute, to commissions more than once on the money which comes into his hands, and if commissions have been allowed, on an intermediate account, on part of the estate,

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will, on the final account, be entitled to commissions only on the balance which has come to his hands since. And in computing his commissions on the final account, commissions are to be reckoned upon the whole amount, and the balance, after deducting from those commissions the commissions allowed on the intermediate account, will be the amount to which he will be entitled. The amount on which the appellant was allowed commissions in the intermediate account was \$23,475. He is entitled to commissions now on the amount which has come to his hands since, \$4,922.98, at the rate of two per cent.

The orphans court so decreed.

The decree appealed from will be affirmed, with costs.

CATHARINE KISE, appellant,

v.

EDWARD M. HEATH et al., respondents.

The evidence in this case—*Held*, to show testamentary capacity on the part of a testatrix eighty-one years old, and that no undue influence had been exerted over her by her daughter, with whom she and her husband had lived for more than twenty-two years, although such daughter received, by the will, a larger share of the estate than her sisters, and notwithstanding such daughter and her husband had received compensation for taking care of testatrix's husband, who died before testatrix, from his estate.

Appeal from decree of Hunterdon orphans court.

Mr. R. S. Kuhl, for appellant.

Mr. O. P. Chamberlin and *Mr. H. G. Chamberlin*, for respondents.

THE ORDINARY.

This appeal brings up for review the decree of the orphans court of Hunterdon county, admitting to probate a paper pur-

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porting to be the will of Rebecca Heath, deceased, late of that county. The grounds of objection to the will are twofold—incapacity and undue influence. It was executed March 5th, 1878. The testatrix was then about eighty-one years old, and was living with her daughter Miranda, wife of Francis Rittenhouse, with whom she and her husband, Daniel Heath (who died there in February, 1878), had lived for twenty-two years. She had but two other children—the caveatrix, Catharine, wife of James Kise, and Mary, wife of Reading Housel. Mrs. Rittenhouse and Mrs. Housel each had one child, and Mrs. Kise was childless. The testatrix's husband died intestate, and his property was divided, according to law, between his widow and his three children, the before-mentioned daughters of the testatrix. Shortly after his death, Mr. and Mrs. Rittenhouse removed to North Carolina. After their vendue of their property, the testatrix went, for a few days, to the house of Henry F. Bodine. From there she went to the house of her son-in-law, Reading Housel, and remained there until the fall of 1878, when she went to board at the house of her grandson, Samuel Housel, where she lived until her death, which occurred in September, 1879. On or about April 1st, 1878, the testatrix executed a letter of attorney to Henry F. Bodine, authorizing and empowering him to act for her in matters of business, and on or about the 4th of the same month, she executed a deed of trust of her property in favor of herself, to Edward M. Heath. She had an estate about \$4,000. By the will, after directing that her debts and funeral expenses be paid, she proceeds as follows:

“In consideration of inadequate compensation for board, lodging, wash and making extra trouble incident to the infirmities of age, for the last years, for myself and late husband, Daniel Heath, it is my will, and I order, give and bequeath to my beloved daughter, Miranda Rittenhouse, wife of Francis Rittenhouse, \$1,000, first and before any division takes place, and then she, said Miranda Rittenhouse, to share equal with my beloved daughter Mary Housel, wife of Reading Housel, and my beloved daughter, Catharine Kise, wife of James Kise, except said Catharine Kise to have only the use and interest of her share during her natural life, and at her death her share to be divided equal between my two daughters, Mary Housel and Miranda Rittenhouse, if they be living, or to their legal representatives, if they, or either of them, be dead.”

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At the time of making the will, a claim made by Mrs. Rittenhouse and her husband against the estate of Daniel Heath, for extra compensation for the care of him and his wife, the testatrix, was under negotiation for settlement between them and the representatives of the estate, and it was compromised by the payment by the administrators of \$1,200, as such compensation. There was an agreement between Daniel Heath and the Rittenhouses for the payment of \$200 a year for the board of himself and his wife, and the \$1,200 were allowed as extra compensation for the twenty-two years during which Heath and his wife had lived with the Rittenhouses. The \$1,200 appear to have been paid April 4th, 1878, about a month after the making of the will in question. When the settlement and payment were made, the Housels and Kises were ignorant of the provision made in the will for Mrs. Rittenhouse, as compensation for the same services. The will was executed with due legal formalities. The testimony on the subject establishes the fact that at the time when the will was made, the testatrix fully understood the business in which she was engaged, and was possessed of testamentary capacity. She herself gave the instructions for the will, and after it had been prepared, it was twice read over to her, and she approved of it. She herself named the executors. Of the witnesses to the will, one, David Bodine, was intimately acquainted with her, and in answer to the question whether she was of sound mind when she executed it, he says, in substance, that he saw nothing to induce him to think that she was not. The other, John H. Philkill, was asked whether she was childish or not, and declined to give an opinion on that subject. He was not asked whether, in his opinion, she had sufficient capacity to enable her to make a will. Two physicians were sworn on the subject of capacity—one, Dr. Cramer, on behalf of the caveatrix, and the other, Dr. Reiley, on behalf of the proponents. The former testifies that he attended the testatrix professionally for several years before her death. He says that he was at Rittenhouse's frequently during the last two years that the testatrix lived there, and that he thinks that what she said during those years was intelligent. He also says that from what he saw and

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knew of her during the years that he attended her, her physical and mental condition was not such as necessarily to require one to take care of her. Dr. Reiley became acquainted with her seven or eight months before her death. He says he talked with her on several topics, and she talked very sensibly; and he says that during the time he knew her he is clearly of opinion that she was competent to make a will.

This latter testimony is important, because it is claimed by the caveatrix that the alleged incapacity was the result of the failure of the testatrix's physical and mental powers by reason of advanced age. The testimony of Dr. Cramer, before referred to, is directly on the allegation made by the caveatrix, that the testatrix was incompetent, by reason of her physical and mental debility, to take any care of herself. The proof is, that though she had the physical infirmities usually concomitant upon advanced age, she retained her mental capacity. Her memory was good. This was strikingly manifested in the preparations for her husband's funeral. She supplied the names of persons to be invited whom her daughter, Mrs. Rittenhouse, had overlooked. She was able to count money and to make change. She frequently read the Bible, and was a faithful attendant at the church to which she was a member, and she appears, from the evidence, to have been an attentive, appreciative and critical listener to preaching. She was of a taciturn disposition, but when she spoke she spoke with intelligence. I attach no importance to the testimony on the part of the caveatrix in regard to the testatrix's conduct at the funeral of her husband, which, it is urged, is evidence of imbecility. In the first place, it is met and overthrown by counter-testimony on the part of the proponents, and in the next place, the fact that she gave no manifestation of grief on the occasion, would not, if such had been the fact, be evidence of incapacity. I see no reason to doubt that she was possessed of full testamentary capacity. In this connection, it may be remarked that the letter of attorney and deed of trust were executed by her, with the knowledge of her family, within a month of the time when the will was made, and her capacity

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execute those instruments seems never to have been doubted or questioned.

It is urged, however, that there is evidence that Mrs. Rittenhouse, the principal legatee, exercised undue influence over her. The grounds on which this claim is based, are that the situation of the parties afforded opportunity for such influence, and that Mrs. Rittenhouse, on the occasion when the instructions for the will were given, made use of an expression which indicated the exercise of it. Mr. Chamberlin was the draughtsman of the will. He appears to have been sent to do the work by his father, who was a scrivener, and who had been requested to draw the will, but from infirmity was disinclined to do it. He says his father communicated to him the fact that the testatrix wanted to see him, or wanted to make a will. He states that he went to see her accordingly; that he said to her that he understood that she wanted to make her will, and she answered that she did; that he then asked her how she wanted it, and she replied that she hardly knew how; that he then said that she must know—that he could not; that she made no immediate answer to that remark; that he then said that she had three daughters, and asked if she wanted to leave them equal shares of her property, and she replied, “Why, yes—I guess so;” that just then Mrs. Rittenhouse came in and said to her: “There is no use in your making a will;” and after making that remark, went out of the room, and then the testatrix proceeded, and told him what disposition she desired to make of her property, which he says was just what the will, as executed, provided for. He adds that he asked her whom she wanted for executor, and she said she had not thought about that. She subsequently, when the draft of the will was approved by her, named the executors, as before stated. The caveatrix insists that the above-mentioned remark of Mrs. Rittenhouse is evidence of undue influence. It does not appear, however, that the latter had any part in the making of the will. She was not present when the instructions for it were given, though they were given at her house. She was not present when the draft of the will was read over by the draughtsman to the testatrix. He says no one was present except himself and the testatrix.

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She was not present when the will was executed. Mr. Chamberlin gives the following account of the testatrix's instructions for the will: She said that she and her husband had, on account of their sickness, been a great deal of trouble to Miranda; that Miranda had to have extra help about the house, and to have strangers there to watch with her, the testatrix's, husband in his sickness, and she wanted her paid for it; that she wanted her to have the first \$1,000 before any division took place, and then to share equally with the others, and that Katy (Mrs. Kise, the caveatrix) was to have only the use of her share. He says that he said to her that he supposed she meant the interest, and she said "yes." He says he thinks she said she did not want Mr. Kise's husband to have it when Mrs. Kise was done with it, but wanted Mary (Mrs. Housel) and Miranda (Mrs. Rittenhouse) to have it. The will having been executed with due formalities and the testatrix having been, at the time of executing it, of competent understanding, the burden of proof of undue influence is on the caveatrix. And undue influence must be proved. As was said in *Humphrey's Will*, 11 C. E. Gr. 513, it is not a presumption, but a conclusion. See also *Boyse v. Rossborough*, 6 H. L. Cas. 2. There does not appear to have been any undue influence when the draft of the will was read and approved, when the will was executed. Giving to the remark made to Mrs. Rittenhouse its fullest effect, it was a suggestion pertinent to the reply of the testatrix to the question of the scrivener whether she wanted to leave her property to her three daughters in equal shares, or how she would leave it, she answered "Yes, I guess so." But, as before stated, it appears that she had previously, in the same conversation, told the scrivener that she hardly knew how she wanted to leave her property, and her reply was merely indicative of her concurrence in his suggestion so far as her general intention was concerned, that her daughters were to have her property; but it did not indicate her full intention on the subject. She subsequently gave him her reason for the gift of \$1,000 to Mrs. Rittenhouse. It was a recognition and compensation for, faithful services and kind attention rendered to her and her husband for over twenty years in their o

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age. It is quite probable that she intended to give to the daughter who had thus discharged her filial duty towards her parents, a substantial reward out of her own estate, irrespective of what her daughter's husband might obtain for the same services out of the estate of her father, the testatrix's husband. Nor is it at all surprising that the testatrix, in the distribution of her property, made a marked discrimination in favor of the daughter with whom she and her husband had passed more than a score of years of their old age, and under whose roof they had found a comfortable home, and to whose filial piety they had been so much indebted.

The scrivener says that he saw nothing to indicate incapacity during the interview in which the remark of Mrs. Rittenhouse was made, and that he is of opinion that the remark did not influence the testatrix in the disposition of her property.

The testatrix lived for about eighteen months after the \$1,200 were paid, and it appears that she had testamentary capacity up to the time of her death; yet she never intimated any dissatisfaction with the will she had made, nor indicated any desire to alter it. It is proved that she was liberal in the use of her money, and that she insisted on her right to do what she pleased with it. Reading Housel, called for the caveatrix, says that one night while she was at his house, (she appears to have been there from April to October, 1878), his wife (her daughter Mary), referring to the gift by the testatrix of the sum of twenty-five cents to the witness's daughter, said to the testatrix that she ought not to be giving her money away, and he says the testatrix seemed to be affronted, and said that her money was her own, and she had a right to do what she pleased with it. There is no evidence, whatever, that the testatrix was not, in making the will, a perfectly free agent; none that her judgment, discretion or wish was overborne by Mrs. Rittenhouse, or that she was acting under any restraint. In other words, there is no evidence that the will was not her own. On the other hand, it appears that she acted of her own volition, and without restraint. The decree of the orphans' court will be affirmed; the costs of appeal to be paid by the appellants.

Lothrop's Case.

In the matter of the application for grant of letters of limited administration upon the estate of JEREMIAH LOTHROP and others.

A mortgagee is entitled to a grant of letters of limited administration on the estate of a deceased subsequent mortgagee of the same premises, who was a non-resident, no administration having been taken out here on his estate, but such administration will be limited to the proceedings already taken, or that may hereafter be taken in the pending foreclosure, or in any other supplemental proceedings for relief on the mortgage.

Mr. J. R. Emery, for the application.

THE ORDINARY.

The petitioner, who is the complainant in a suit in chancery of this state, for the foreclosure and sale of certain mortgage premises, applies for the grant of letters of limited administration on the estate of Jeremiah Lothrop, the mortgagee named in the mortgage of the property subsequent to that of the petitioner and John Balch and Mary B. Doyle, two of Lothrop's *cestui que trust*, he being a mere trustee. They are all three dead. At their death they were all non-residents, and no grant of administration of their estates has been made in this state. Lothrop died in 1875, and the other two in 1871. On the estate of Lothrop, administration was granted in New York, and Balch left a will which was proved in New York, but no administration has been granted in this state on the estate of either. Mary Doyle died intestate, and no administration of her estate has been taken anywhere. The administrator of Lothrop and the executor of Balch were made parties to the suit in chancery and were proceeded against as absent defendants, but neither of them appeared.

The necessity for the existence of the power of creating such representation as is now applied for in such cases as this, is obvious. Unless such power exist, a failure of justice will ensue. The petitioner cannot safely proceed with her suit to foreclose her mortgage in the absence of the representatives of the deceased

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trustee and *cestuis que trust*, and she is unwilling and ought not to be required to furnish general administrators for the estates. Of the power of this court to grant the letters, I have no doubt. In England such letters are granted by the ecclesiastical court. *1 Williams on Exrs. 522, 523*. The powers of this court in granting letters of administration are not special or limited, but full and general. *Coursen's Will, 3 Gr. Ch. 408*. In England such letters as are now applied for are granted to a nominee of the applicant, and they are limited to the purposes of the suit. *Coote on Probate 122*. By statute (*15 & 16 Vict. c. 86 § 44*), the court of chancery in England is authorized to appoint an administrator *ad litem*, where necessary from want of a representative, or to proceed in the suit without representation. We have no such law. The letters will be granted. They will be limited to the purpose only of attending, supplying, substantiating and confirming the proceedings already had or which shall or may hereafter be had in the suit in the court of chancery, or in any other suit or suits which may hereafter be commenced in that or any other court for the relief sought by the bill in the suit in chancery, and until a final decree shall be made therein, and such decree be carried into execution, and the execution thereof fully completed, but no further or otherwise, in any manner whatever. The administrator *ad prosequendum* thus appointed will have no authority to receive any money realized on the mortgage which he represents, or the decree or execution.

NOTE.—If the administration granted be more limited than the purposes of the suit require, and it is in the plaintiff's power to obtain a more general administration, the court may require him to do so (*Faulkner v. Daniel, 3 Hare 199*; *Johnson v. Hodgins, Ir. L. R. (10 Eq.) 525*; *Davis v. Chanter, 2 Phil. 545*).

In a suit to recover titles of a number of tenants and occupiers, one of the defendants had died, and there was no legal representative of him.—*Held*, that his widow might be appointed for that purpose, so far as the suit went (*Ely v. Gayford, 16 Beau. 561*).

On a general creditor's bill by the representative of a mortgagee, on behalf of himself and other creditors who may come in, an administrator *ad litem* is insufficient (*Groves v. Lane, 16 Jur. 854, 1061*; see *Despard v. Head, 2 Moll. 339*).

Pending the administration of an estate in England, a legatee domiciled in

Lothrop's Case.

Nova Scotia, died there, and his will was proved there, but the executors declined to prove in England.—*Held*, that the court could appoint an administrator to represent him in England, for the purpose of reviving the suit (*Bliss v. Putnam*, 29 Beav. 20).

F., a testator, died, having appointed three executors; two renounced, and the third, after taking probate, died intestate. All the residuary legatees renounced, and administration *de bonis non* was granted to K., a creditor. K. died, leaving personalty of F. unadministered. At the time of F.'s death, proceedings against him for the misappropriation of part of the funds were pending, and administration to represent K. in those proceedings was granted (*Day v. Thompson*, 3 Sw. & Tr. 169; also *Grant's Case*, L. R. (2 P. Div.) 435).

A party not heard from for more than seven years, was, if deceased, entitled to a share of a residuary estate, which had been paid into the court of chancery. He had no other property in England.—*Held*, that general administration would not be granted, but one limited to the proceedings in chancery to obtain such share (*Turner's Case*, 3 Sw. & Tr. 476).

A wife died in France, leaving personal estate there, but none in England; and it was alleged that, by the law of France, her husband, from whom she had eloped, could not establish his claim to her property there, without a grant from the English court.—*Held*, that the court had no jurisdiction to make such grant (*Tucker's Case*, 3 Sw. & Tr. 585).

In a suit instituted in chancery to administer on an estate, an amount was found due to the executors of a surviving trustee, and those executors appointed three persons attorneys to collect and receive such amount.—*Held*, that while they were not creditors so as to entitle them to general administration, they had such an interest as authorized the court to appoint their nominee as limited administrator (*Frampton's Case*, 9 Jur. (N. S.) 755).

Pending a bill for relief against several directors of a corporation, for an alleged breach of trust, one of them died, leaving, as appeared, a will, appointing his widow executrix; but she had not seen the will, and did not know its contents, nor had his solicitors of record been instructed since his death.—*Held*, that the court would, on the plaintiff's application, appoint a person, consenting to act, to represent such defendant in the suit, unless the solicitors or widow should appear, after notice, and elect to represent the decedent's interest (*Joint Stock Co. v. Brown*, L. R. (8 Eq.) 376).

After a decree for an account had been rendered against two trustees, one of them died intestate, and, as was alleged, insolvent.—*Held*, that no limited administration need be taken out on such estate (*Moore v. Morris*, L. R. (3 Eq.) 139).

A tenant for life died after obtaining a decree for arrears of income due to him. He left a will, but his executor died without having proved it.—*Held*, that the court could, on the application of one of the defendants, revive the suit as against the other defendants, without any representative of the tenant for life, but without prejudice to any subsequent intervention by such representative (*Hayward v. Pile*, L. R. (7 Ch.) 634).

There can be no general account or administration of an estate, on the

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application of a limited administration (*Croft v. Waterton*, 13 Sim. 653); nor can such administrator represent any other interest of the estate in the litigation (*Moore v. Choat*, 8 Sim. 508; *Hodgens v. Hodgens*, Ir. L. R. (10 Eq.) 4; *Case v. Cork*, 2 Y. & C. 130; *Ellice v. Goodson*, 2 Coll. 4; *Clough v. Dixon*, 10 Sim. 564).

On the hearing of a petition relating to the disposition of a trust fund, it appeared that A. had an interest in it which might be asserted. A. died in the United States, having appointed as his executor B., who proved the will there, but not in England. Counsel appeared for B. at the hearing.—*Held*, that the court had power to appoint such counsel to represent B.'s interest (*Hewiston v. Todhunter*, 15 E. L. & Eq. 356).

The death of a married woman had been caused by negligence, and her husband, a mariner, was abroad and not expected to return within the time limited for bringing an action to recover damages, whereupon letters limited to bringing such action were granted to decedent's mother (*Williams's Case*, 31 L. J. P. 40; see *Illinois Cent. R. R. v. Cragin*, 71 Ill. 177; *Jeff. R. R. v. Swayne*, 26 Ind. 477).

The grant can only be made where the litigation is pending (*Gordon's Case*, Ir. L. R. (1 Eq. 179); and not for an amount exceeding the applicant's claim (*Fleming's Case*, 8 Ir. Jur. (N. S.) 89).

In Tennessee, the county courts may grant administration limited to a single act, such as the revival and prosecution of a judgment recovered by the decedent (*McNairy v. Bell*, 6 Yerg. 302).

A native of Texas, having no other property in Tennessee, instituted a suit there against his brother and others, and pending such suit died.—*Held*, that the court had authority to appoint a third person to carry on the suit against the wishes of such brother, and that such appointment did not, in a proper case, prevent the granting of general administration (*Jordan v. Polk*, 1 Sneed 330; also *Vaughan's Case*, Ir. L. R. (10 Eq.) 1; *Robinson v. Bell*, 1 De G. & Sm. 430. See, also, *Alexander v. Barfield*, 6 Tex. 400; *Yarborough v. Harris*, 3 Dev. 40; *Smiley v. Bell*, Mart. & Yerg. 378; Code of Ala. § 2625; *Russell v. Umphlett*, 27 Ark. 339; *Ewing v. Moses*, 50 Ga. 264; *Ellis v. Deane*, Beat. 15; *Saunders v. Dunman*, L. R. (11 P. Div.) 825).—REP.

Poulson v. The National Bank of Frenchtown.

WILLIAM J. POULSON et al., appellants,

v.

THE NATIONAL BANK OF FRENCHTOWN et al., respondents.

1. After the removal of administrators and the appointment of another in their stead, a creditor of the estate may file exceptions to their account : well as the new administrator.

2. The orphans court has power to determine whether exceptants are creditors, and, as such, interested in the settlement of the estate.

Appeal from order of Hunterdon orphans court.

Mr. J. G. Shipman, for appellants.

Mr. J. R. Bullock, Mr. J. T. Bird, Mr. J. N. Voorhees ~~et al.~~
Mr. W. M. Davis, for respondents.

THE ORDINARY.

The appellants are administrators of Samuel B. Hudnit, deceased. They were, by the order of the orphans court of Hunterdon county, removed from office, and Edward P. Conkling appointed in their stead. They filed their account, and respondents, as creditors of the intestate, filed exceptions to Mr. Conkling filed none. The counsel of the appellants moved the court to strike out the exceptions, on the ground that they were filed by persons who did not appear to have any right except. He insisted that the new administrator alone had the right, and, besides, if creditors had a right to except, that it did not appear that the exceptants were, in fact, creditors.

The question presented is, whether the creditors of, or other persons interested in an estate may file exceptions to the account of a removed or discharged executor or administrator ; or whether the privilege of exception is confined to the newly-appointed administrator. The one hundred and twenty-ninth section of the orphans court act provides that the new administrator shall have

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power and authority to demand, receive and recover the property and assets of the estate, and to maintain all proper actions, at law or in equity, for the recovery thereof, and shall be authorized to do all acts necessary for the administration and settlement of the estate. The next section provides that the discharged or removed executor or administrator shall forthwith deliver over to the new one, his successor, all the property and assets which he may hold, and shall, at the next term of the court, state and settle his account, and pay the balance shown to be due to his successor, according to the order of the court; and that, on his failure to do so, the court may enforce the performance of the order by fine, for the benefit of the estate, to be collected by execution against the goods, chattels and lands of the delinquent, or the payment of the fine may be enforced by attachment for contempt. The next section provides that the new administrator may have actions of trover, detinue or in case for such goods and chattels as shall have come to the possession of the discharged or removed executor or administrator, and for any breach of trust, waste, embezzlement or misappropriation thereof, and may proceed, by action at law or suit in equity, for the recovery of the assets, either against the discharged or removed executor or administrator, or any other person into whose possession the assets may have come or shall be.

The right of any person interested in the estate to except to the account of an executor or administrator is recognized by the one hundred and fifth section of the act. The question is, whether such right is taken away by the other provisions above stated, for the obtaining or recovery of the estate from a discharged or removed executor or administrator. The right of a *cestui que trust* to except or object to the account of his trustee is a very obvious one, and one of which he cannot be deprived. The right to an account necessarily and manifestly implies the right of objection to the account. The undoubted right of those who are interested in an estate to object to the account of the persons by whom it is administered cannot be taken away from them, and the legislature has not attempted to do so. Instead of attempting to deprive them of existing rights, it has

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sought to give them new and additional protection ; and though it is the duty of the new administrator to object to the account of the discharged or removed executor or administrator, and he is the representative of those interested in the estate, for that purpose as well as others, the fact that it is his duty does not deprive them of their right to except also. He may have but little or no knowledge of the estate, and therefore may not be able to make the objections that should be made. He may not be able to make any where many ought to be made. And if he were to make objections under information from those whom he represents, he might not be able to litigate them, while they could. The fact that a new trustee has been appointed in the place of one removed, could not take away the right of the *cestui que trust* to object to the account of the latter. The argument *ab inconvenienti*, urged in the present case, has no foundation. It would apply equally to the right to except to any account of a trust in favor of a number of *cestuis que trust* or to the right to except to the account of any executor or administrator, guardian or trustee where the persons interested and who have a right to object are many. Practically, however numerous the exceptions, the litigation is within the control of the court, and it will so conduct it as to prevent it from being oppressive or vexatious. In the case of the account of a discharged or removed executor or administrator, guardian or trustee, all the persons interested in the estate, including the new appointee, have the right to except. The case of *McDonald v. O'Connell*, 10 Vr. 318, is not in contrariety to this conclusion. It was there held that on the removal, by the orphans court, of an executor or administrator who has wasted the estate, the right of redress for the *devastavit* passes to his successor in office, and cannot be exercised by creditors. The object of exception to the account merely is to ascertain what is due from the accounting executor or administrator, and what he should be required to pay or deliver over ; and when that has been ascertained it is the duty of the new administrator to receive or recover it. The right to except to the account does not necessarily involve the right to receive or recover the amount which may be adjudged to be due.

Mallett v. Bamber.

The objection that the respondents did not appear to be creditors, and therefore did not appear to be interested in the estate, cannot be maintained. It was without the power of the court to determine whether the exceptants were to be regarded as being interested in the estate as creditors, or not. An administrator or executor may be removed before any claim against the estate has been proved, and it is competent for the court to determine, in such case, whether one who excepts to his account, as a creditor of the estate, is interested in the estate, as such, or not, as it may whether one who excepts in any other right has such right or not.

The order of the orphans court will be affirmed, with costs.

ELIZA MALLETT et al., appellants,

v.

ISAAC BAMBER, respondent.

Although the allowance of the costs, expenses and counsel fees of the caveators against the probate of a will is, by statute, discretionary with the court, yet, when there exist no reasonable grounds for contesting such probate, or the litigation is needlessly protracted and expensive, such allowance should be denied.

Appeal from decree of Passaic orphans court.

Mr. C. L. Corbin, for appellants.

Mr. S. Tuttle, for respondent.

THE ORDINARY.

The orphans court of Passaic county, by its decree, after litigation before it, admitted to probate a paper purporting to be the will of Mary Hampson, deceased; and, adjudging that the caveators had reasonable cause for opposing the will, directed

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that the costs and expenses of the litigation, and a counsel-fee \$200 to the counsel of each side, be paid out of the estate. From so much of the decree as awards costs, expenses and counsel-fees to the caveators, the proponents appealed to this court. The printed book of the evidence contains over three hundred pages. The testimony was taken by question and answer. There are more than twenty-six hundred in number. A great part of the testimony is utterly irrelevant. The caveators were Isaac Bamber, a brother, and William L. Bamber, nephew of the testatrix. She was a widow, and had no children. By her will, she gave to her brother Peter, in England, \$2 a week for life; to two of her nieces, daughters of her son Eliza Mallett, \$150 each; to Edward A. Absom, an adopted son of Mrs. Mallett, \$100, to be paid to him when of age; to her niece, Elizabeth Bridge, \$300; to her niece, Leah Bridge, daughter of Elizabeth, \$200, and directed that a note of \$160, given to her by James and Catharine Bridge (the latter was her sister) be given up to them at her decease. To the Ladies' Protestant Hospital of Paterson she gave \$100, if such hospital should exist at the time of her death, and to the Ladies' Protestant Orphan Asylum of Paterson, \$100, and gave all the rest of her estate to Mrs. Mallett. The will was contested on the ground of incapacity and undue influence, the influence being imputed to Mrs. Mallett. The court very justly adjudged that no ground of objection was maintained. The award of costs to the caveators in such cases is left to the discretion of the court, and it is a discretion which should be carefully exercised; and while on the one hand, due examination and scrutiny into the circumstances of the making of a will are not to be discouraged, yet tests not undertaken in good faith, or, if entered upon *bona fide*, conducted in such a manner as to occasion needless expense, are in no wise to be encouraged. The estate, in this instance, is large; but whether the estate be large or small, the principle and the rule are the same. A very careful examination and consideration of the testimony leads me to the conclusion that there was no reasonable ground for the belief on the part of the caveators that the testatrix was incompetent to make a will.

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that it was the result of undue influence on the part of Mrs. Mallett. They knew that the testatrix was not well disposed towards them, on account of her resentment of their treatment of her, and they had no reason, under the circumstances, to expect that she would give them any part of her estate, by any testamentary disposition she might make. It is proved that Isaac Bamber, in the winter previous to the spring in which the will was made, urged Mrs. Mallett to get the testatrix to make a will, giving him the same amount which she would give to Mrs. Mallett, and threatened to make trouble by contesting the will, on the ground of undue influence, if she did not do so. He had grievously affronted the testatrix. She had gone to his house to pay a short visit, and she did not find the family at home. She stayed over Sunday, however, and while there entered into familiar conversation with their servant, garrulously giving to her an account of her own life, which had been humble and laborious, and making also some unpleasant but true statements of like character in regard to Isaac and his family. He was very much offended with this, and scolded her severely for it. William L. Bamber also had offended her. He had, as she said, called her "an old hag." He denies it, saying that what he said was that, on a certain occasion, she acted like a crazy old hag. He says he did not say so to her, but to Isaac, who told her of it. Between her and Mrs. Mallett there were very close sisterly relations. She confided in the latter fully, and there is no evidence that, in any instance, her confidence was abused, but, on the other hand, Mrs. Mallett appears to have been careful for her welfare, both as to her personal comfort and her pecuniary affairs. That the confidence which the testatrix reposed in Mrs. Mallett was carried to an unbusiness-like extent, even to leaving in the possession of the latter, for safe keeping with her other papers, the evidence of indebtedness of Mrs. Mallett to her, was not evidence of want of testamentary capacity or of undue influence, but simply of trust in her integrity and fidelity. It appears from his own testimony, that Isaac Bamber did not contemplate opposing the will, and was disinclined to do so (he says because he did not think it worth the trouble), but was finally persuaded, and, yielding to the urgency of others, joined

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in the caveat. The litigation was not warranted, and if it had been, the extent to which it was carried, in the amount of utter irrelevant testimony with which the record abounds, would, of itself, be sufficient ground for denying the caveators payment of their costs and counsel-fees out of the estate. *Wintermute's Will* 12 C. E. Gr. 447; *S. C. on appeal*, 1 Stew. Eq. 437; *Perrine Applegate*, 1 McCart. 531; *Collins v. Townley*, 6 C. E. Gr. 35.

The part of the decree appealed from will be reversed, but without costs.

MICHAEL MCGILL et al., administrators, appellants,

v.

MARY J. O'CONNELL, respondent.

A guardian was held liable for the amount of a promissory note given him to his ward's mother, and after her death taken into his own custody ostensibly for safe keeping, such note being found after his death among effects, with his signature torn off, and also for the proceeds of sale of certain furniture, which also belonged to the ward's mother, and was sold at auction by him; and it was held to be no defence that no administration of the mortgaged estate was ever taken out; both the note and the furniture having been taken by the guardian, as such, into his possession.

On appeal from decree of Passaic orphans court allowing exceptions to, and surcharging the final account of, Felix McKenna deceased, as guardian of Mary J. O'Connell.

Mr. Warne Smyth, for appellants.

Mr. J. W. Griggs, for respondent.

THE ORDINARY.

Felix McKenna, now deceased, was, in 1874, appointed guardian of Mary J. O'Connell, then and still a minor. He died intestate, and his administrators filed their account of his guardianship. The infant, by her next friend, her sister, filed exceptions thereto, claiming that it should be surcharged with half of the amount of the proceeds of the sale of the household

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furniture which their mother, Bridget O'Connell, who lived and died in Paterson, owned and had in possession at her death, and which was taken by Mr. McKenna into his possession and sold, and half of the amount, with interest, of a promissory note for \$600 made by McKenna, dated June 1st, 1870, and payable one year after date, to the order of Bridget O'Connell, without defalcation or discount, with interest at seven per cent. The note was given by him to their mother, and held by her up to within a short time before her death, when she handed it to her daughter Annie, bidding her take care of it. The guardian requested Annie, a few days after her mother's death, to give it to him, saying that he thought he could take better care of it than she could, and that he would put it in his safe. It was then un mutilated and entire. It was found, after his death, in his safe, with his signature torn off. The orphans court allowed both exceptions (though as to the amount, not to the extent claimed), and surcharged the account accordingly. The cause is submitted on the briefs of counsel.

No objection was made, either below or here, to the competency of the testimony adduced. The principal witness was Annie. She was a competent witness for the exceptant. It appears, from her testimony, that her mother, who was a widow, died in 1874, intestate, and that no administration of her estate was ever granted. The guardian took into his possession, as guardian, as she says, the household furniture of her mother, and, as not only appears by her testimony, but by that of the auctioneer whom he employed to sell it, sold it, and realized from the sale \$142.50, as net proceeds, which were paid to him by the auctioneer. The note was given by Annie to the guardian under the circumstances before stated. The presumption, from the fact that it was found in his possession at his death, with his signature torn off, is that the signature was torn off by him, and, under the circumstances, such tearing off of the signature is an admission of the genuineness of the note and his liability to pay it. The case, on this point, is within the principles of the maxim, *omnia præsumentur contra spoliatores*. McKenna, therefore, was chargeable with the amount of the note and interest.

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But it is urged (and this is the principal point discussed in briefs of counsel), that the title to the note and furniture never in the wards, but, on the death of their mother, was abeyance, awaiting the appointment of a lawful representative or successor—an administrator. In the first place, the guardian took the furniture into his possession as guardian (such is the evidence), and sold it as the property of his wards; and he took the note out of the possession of one of his wards, to whom his mother delivered it with an injunction to take care of it. By the law, the lawful successor of a decedent holds the title to his chattles, in trust, first, for the payment of his debts, and then for his legatees, if disposed of by will, or, if not, for those entitled thereto under the statute of distributions. *Smith's Law of Real and Pers. Prop.* 323. In the case in hand, the children were the equitable owners of the chattels in question, subject to the claims of creditors, if any; and it does not appear that there were any creditors. Their guardian having taken into his possession, as their property, the chattels to which they had such equitable title, could not shield himself from accounting to them, therefore, on the mere ground that they had no legal title, but, under the circumstances, would have been estopped, for the most obvious reasons of justice, from denying their title.

The decree of the orphans court in reference to the proceeds of the sale of the furniture is correct, but as to the note, is far too little; but it has not been appealed from by the exceptant, and it will be affirmed, with costs.

JOHN B. ELLISON et al., appellants,

v.

IRENÆUS H. LINDSLEY, assignee &c., respondent.

1. The time limited for creditors to file their claims with an assignee, under an assignment for the benefit of creditors, expired on the 8th day of January. On that day, the appellant, a creditor residing in Philadelphia, discovered that fact, although, by misreading his own entry, he had previously supposed

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18th of January was the last day. He thereupon forwarded his claim to assignee, at Newark, by mail, which ought to have been delivered at five o'clock in the afternoon, but was not, in fact, delivered until the next day. Held, that such claim was neither "presented" nor "exhibited" to the assignee, within the terms of the statute, within the time limited.

The orphans court has no power to relieve such creditor on the ground that his omission to file his claim in due time arose from his mistake, and not from mere negligence.

Appeal from decree of Essex orphans court. On state of the evidence and briefs of counsel.

Mr. F. S. Fish, for appellants.

Mr. J. E. Howell, for respondent.

THE ORDINARY.

The time within which the claims of creditors of Herbert G. Cole, a debtor who had assigned his property under our assign-

NOTE.—A notice of amercement must be served personally on a sheriff, and not sent by mail (*Anon.*, 1 Hal. 159). Proof of putting into the post office a letter containing a notice, is not sufficient proof of service (*Anon.*, 6 Hal. 94; *Edison v. Henry*, 1 Caines 66; *Hickey's Case*, 1 R. (10 Eq.) 117; see *Fletcher v. Minder*, 1 F. & F. 357). Where a plea was sent by mail in time, a judgment in default for want of its having been received, was opened (*Ludlow v. Heywood*, 2 Caines 386; *Cole v. Stafford*, *Cole & Caines Cas.* 110; *Stafford v. Cole*, *Johns. Cas.* 413); so, where the plea was received by the plaintiff's attorney, but, on inspection, refused to take it from the post-office (*Clark v. McFarland*, 1 Wend. 635). Notice of trial may be served by post, unless its receipt be required (*McCourry v. Suydam*, 5 Hal. 245); and notice to substitute another defendant (*Draper v. Holland*, 3 Edw. Ch. 272); and notice to give security for costs (*Abbot v. Ledden*, *Bert. (N. B.)* 33). Willful refusal to take from the post-office a letter containing process is not service thereof (*Redpath v. Williams*, 1 Bing. 443. CONTRA, *Aldred v. Hicks*, 3 Taunt. 186). Delivery of process put up in a letter, in the absence of the person to whom it is addressed, is not service from the time when such letter is opened (*Arrowsmith v. Engle*, 3 Taunt. 234). Service of notice to quit, sent by mail by a landlord to his tenant, is invalid (*Papillon v. Brunton*, 5 H. & N. 518; see *May v. Rice*, 108 Mass. 150). Query—Whether depositions taken under a foreign commission may be received by mail (*Simms v. Henderson*, 11 Q. B. 1014).

The officer is not bound to take from the post-office a letter containing process, on which the postage is unpaid. (*Hart v. Weatherley*, 4 Dowl. P. C. 171; *Anon.*, 1 Hill 217; *Bross v. Nicholson*, 1 How. Pr. 158).

That a *capias* in another suit and a notice of amercement were mailed to-

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ment act, were, by law, to be put in to entitle the holders to dividend, expired on the 8th of January. The appellants were creditors, and intended to file their claim within the limited period, but being under a mistake, up to the 8th, as to the time when it ended (they supposed it expired on the 18th instead of the 8th), they delayed filing it until the 8th, on which day they discovered their mistake. On that day they mailed their claim at Philadelphia, to the assignee, at Newark, in time to reach the latter place so as to be delivered by the letter-carrier to the assignee at about five P. M. of that day. It was not, in fact, delivered to him until the next day. It does not appear that it reached Newark before the 9th. On exception to it by the assignee, the orphans court rejected it as not filed in time, and hence this appeal. The only question presented for decision was whether such posting of the claim was a "presenting" (the term used in the third section of the act) or "exhibiting" (the term employed in the twentieth section) of the claim within the limit

gether, in one envelope, to a sheriff, more than ten days before the beginning of the term, and the *capias* duly served and returned, is not sufficient proof that the sheriff received the notice more than ten days before the beginning of the term (*Melvin v. Purdy*, 2 Harr. 162); although sufficient as to their receipt (*Smith v. Campbell*, 6 Dowl. P. C. 728).

Notice of an allotment of shares sent by mail to a stockholder, and not received, is good. (*Harris's Case*, L. R. (7 Ch.) 587; *Townsend's Case*, L. (13 Eq.) 148; *Watts's Case*, L. R. (15 Eq.) 18; but see *Reidpath's Case*, L. (11 Eq.) 86; *British Co. v. Colson*, L. R. (6 Exch.) 108).

Whether the person to whom a letter is directed, after satisfactory proof of mailing it, ever received it, is a question for the jury (*Starr v. Torrey*, 2 Z. 190; *President v. Hart*, 3 Day 491; *Greenfield Bank v. Crafts*, 4 Allen 47; *Tanner v. Hughes*, 53 Pa. St. 289; *Warren v. Warren*, 1 C. M. & R. 250).

As to the presumption from the senders, usual course of business, see *Hurlington v. Kemp*, 4 Camp. 193; *Skilbeck v. Garbett*, 7 Q. B. 846; *Ward v. Lovesborough*, 12 C. B. 252; *Spencer v. Thompson*, 6 Ir. C. L. 537.

Whether the postmaster could be held responsible, see *Whitfield v. Desperer, Corp.* 754; *Hordem v. Dalton*, 1 C. & P. 181; *Ford v. Parker*, 4 Ohio 576; *Sawyer v. Corse*, 17 Gratt. 230; *Fitzgerald v. Burrill*, 106 Mass. 445; *Keenan v. Southworth*, 110 Mass. 474, and cases cited; *Foster v. Metts*, 55 M. 77; *Conwell v. Voorhees*, 13 Ohio 523; *Hutchins v. Brackett*, 22 N. H. 27; 2 Thomp. on Neg. 819, 898.

Notice sent by mail to South Carolina, during the rebellion, was held invalid (*Harden v. Boyce*, 59 Barb. 425; *Todd v. Neal*, 49 Ala. 266; *Donegan v. Wood*, -

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period, within the meaning of the act. It certainly cannot be held to be so. If mailing the claim in time to reach the assignee by due course of mail, if no delay should occur, were to be held to be equivalent to presenting or exhibiting the claim, though it should not reach the assignee, it would, of course, be so on any other day than the last day of the limited period as well as on that day. The statute imposes on the assignee the duty of filing a true list of all the creditors of the assignor, as shall claim to be such, and requires that he do so at the expiration of three months from the date of the assignment. *Rev. 37 § 5.* And to that end the creditors are to present their claims under oath or affirmation. *Rev. 37 § 3.* If they fail so to exhibit their claims within the time limited by the act, their claims will be barred of a dividend unless the estate shall prove sufficient, after the debts exhibited and allowed are fully satisfied, or they shall find some other estate not accounted for by the assignee, before distribution, in which case they shall be entitled to a ratable proportion there-

242; *McQuiddy v. Ware*, 20 Wall. 14; *Hopkirk v. Page*, 2 Brock. 20; *Citizens' Bank v. Pugh*, 19 La. Ann. 43; *Shaw v. Neal*, Id. 156; *Lapeyre v. Robertson*, 20 La. Ann. 399).

Where a substituted service of process, &c., by mail, is authorized by statute, a strict compliance therewith must be shown (*Rogers v. Rogers*, 3 C. E. Gr. 445; *Tate v. Tate*, 11 C. E. Gr. 56; *Gaffney v. Bigelow*, 2 Abb. N. C. 311, and note; 1 Dan. Ch. Pr. 435; *Jacobs v. Hooker*, 1 Barb. 71; *Anon.*, 25 Wend. 677; *Chataque Bank v. Risley*, 6 Hill 375; *People v. Alameda Co.*, 30 Cal. 182; *Gray v. Palmer*, 9 Cal. 616; *Sharp v. Dangney*, 33 Cal. 505; *Wallace v. Wallace*, 13 Wis. 224; *Ritten v. Griffith*, 16 Hun 454; *Foley v. Connelly*, 9 Iowa 240; *Clark v. Adams*, 33 Mich. 159; *Wilson v. Basket*, 47 Miss. 637).

As to mistakes or omissions in the name or address, see *Walter v. Haynes*, Ry. & Moo. 149; *Gordon v. Strange*, 1 Erch. 477; *Oothout v. Rhineland*, 10 How. Pr. 460; *Smith v. Smith*, 4 Greene (Iowa) 266; *Leonard v. New York Bay Co.*, 1 Stew. Eq. 192; *Likens v. McCormick*, 39 Wis. 313; *Scorpion Co. v. Martin*, 10 Nev. 370.

Such service is effected, generally, only from the time when the notice is received (*May v. Rice*, 108 Mass. 150; *Reg. v. Leonimster*, 2 B. & S. 391; *Reg. v. Slawstone*, 18 Q. B. 388; *Colvill v. Lewis*, 2 C. B. 60; *Reg. v. Richmond*, E. B. & E. 253; *Slevens v. Wheeler*, 43 Wis. 91; *Schenck v. McKie*, 4 How. Pr. 245; *Prebles v. Rogers*, 5 How. Pr. 208; *Crittenden v. Crittenden*, Id. 310; *Morris v. Morange*, 17 Abb. Pr. 86; see, however, *Radcliff v. Van Benthuyzen*, 3 How. Pr. 67; *Van Horne v. Montgomery*, 5 How. Pr. 238; *Elliott v. Kennedy*, 26 How. Pr. 422; *Schuhardt v. Roth*, 10 Abb. Pr. 203).—REP.

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from. *Section 20.* A claim sent by mail may, of course, ne-
reach the assignee. The creditor who has recourse to that meth-
of transmitting his claim takes the risk of its reaching its des-
nation in due time. The assignee is to know who are the cre-
itors who make claim as such by their act in presenting or exhib-
ing their claims within the prescribed period.

It is urged, in this case, that the failure to present the claim
an earlier day was due to a mere mistake on the part of the app-
lants, and that that fact entitles them to a consideration which th-
could not claim if they were guilty of negligence. The alleg-
mistake was wholly their own. It arose from misreading the ent-
in their own book, of the time when the limitation would exp-
The orphans court has no power to relieve the appellants fr-
the consequences of their mistake. The language of the stat-
is clear, and the court was not at liberty to extend it by const-
tion. *Proprietors of Morris Aqueduct Co. ads. Jones, 7 Vr 2*
Stelle v. Conover, 3 Stew. Eq. 640. In this connection it
be added, though it has no bearing on the conclusion reac-
that the appellants had time enough, after they discovered t-
mistake, to present their claim to the assignee; their error
in trusting to the mail rather than to send a messenger.

The decree of the orphans court will be affirmed, with CC



JOSEPH S. MOUNT, administrator, appellant,

v.

GEORGE VAN NESS, respondent.

An ancestor bought certain lands, and, by his deed, assumed to pay a mortgage thereon, and its amount was allowed to him as so much of the purchase money. *Held*, that this was not such personal assumption of the mortgage as entitled the heir, to whom the premises descended, to exoneration out of the personal estate for the amount of the mortgage.

Appeal from decree of Mercer orphans court. On state of the case.

Mount v. Van Ness.

Messrs. A. G. Richey and G. D. W. Vroom, for appellants.

Mr. James Wilson, for respondent.

THE ORDINARY.

The question presented for adjudication is whether the heir at law is entitled to exoneration out of the personal estate for the amount of the mortgage on the land descended, subject to which the ancestor bought it, and which he assumed in the deed to him to pay, and the amount whereof was allowed to him as so much of the purchase-money. The orphans' court held that it was not, and hence the appeal. I consider myself bound, in deciding this question, by the decision in *McLenahan v. McLenahan*, 3 C. E. Gr. 101, which was followed in *Campbell v. Campbell*, 3 Stev. Eq. 415. In the former case it was held that if land descends, or is devised, subject to a mortgage debt not created by the decedent, the heir or devisee takes the property *cum onere*, and is not entitled to have the debt paid out of the personal estate, unless the decedent has directly assumed the debt, intending to make it a charge on his personal estate, or shall have so expressly directed by the will; and that it is not enough that he has assumed to pay the debt, or has rendered himself liable to be called on directly by the creditor to pay it. It is urged, however, that the decision in that case, so far as it seems to govern this, is a mere *obiter dictum*; or, if not, is based on a different state of facts; that it does not appear there, as it does here, that the decedent assumed the payment of the mortgage debt. It did appear that the amount of the mortgage was retained by him out of the purchase-money, and therefore that his personal estate had had the benefit of it; that is, that his personal estate was so much more than it would have been had the whole of the purchase-money been paid. It also appears, by the report, that application was made on the hearing for leave to amend the bill by adding an allegation that the decedent, at the time of the conveyance to him, verbally promised his grantor to pay the debt. Such an assumption would have been valid, and might have been enforced. *Biles v. Beach*, 2 Zab. 680; *Wilson v. King*, 8 C. E. Gr. 150.

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But the chancellor said that the proposed amendment would not affect the result. His mind was drawn to the very question before me, and he was dealing with an application (not denied but for the sake of the argument and decision admitted) to infuse into the case the very ingredient which is said to distinguish it from that under consideration. It was, therefore, necessary to the adjudication upon the rights of the parties before him, to consider the case as if it possessed that element. The weight of authority is in accordance with that decision. In order to an exoneration of the land by throwing the burden on the person-estate, it must appear that the decedent has not only made himself answerable for the payment of the mortgage, but has directly and absolutely made the debt his own, or has in some other way manifested an intention to throw the burden on the person-estate in ease of the land. And this doctrine is based on principle. In *Cumberland v. Codrington*, 3 Johns. Ch. 229, Chancellor Kent after reviewing the English cases on the subject, says: "The series of cases which I have thus examined, shows very conclusively that by the English equity system, as it has been declared and received for the last thirty or forty years, the purchase of an equity of redemption, with a covenant of indemnity to the mortgagor against the mortgage debt, did not make the debt the grantee's own, so as to render his personal assets the primary fund to pay it. The cases all agree that no covenant with a mortgagor is sufficient for that purpose. There must be a direct communication and contract with the mortgagee, and even that is not enough unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real to the personal fund." Again he says: "When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him land with an encumbrance on it, he becomes a debtor only in respect to the land; and if he promises to pay it, it is a promise rather on account of the land which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the

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personal estate contribute to ease the land as between the real and personal representatives, will here make the land relieve the personal estate. There is good sense and justice in the principle, and I feel the force of the doctrine that it requires very strong and decided proof of intention to shift the natural course and order of obligation between the two estates." The question is not whether the decedent assumed to pay the mortgage, and so made himself liable therefor, as between him and his grantor, but whether he, by direct action, made himself liable, in his personal estate, to the mortgagee; that is, as between him and the mortgagee, expressly made the debt his own debt.

The mere assumption to pay the mortgage on the land, if made by the grantee to the grantor, is at most an indemnity merely; and though, if the grantor be personally liable for the payment of the mortgage, the mortgagee may, in equity, pursue the grantee on his assumption, that, however, is because, and only because, the mortgagee is, in equity, entitled to the benefit of all collateral securities which his debtor has taken for the mortgage debt.

Klapworth v. Dressler, 2 Beas. 62; *Norwood v. De Hart*, 3 Stew. Eq. 412; *Crowell v. Hosp. of St. Barnabas*, 12 C. E. Gr. 650. And if the grantor is not personally liable for the mortgage debt, the mortgagee cannot look to the grantee, personally, at all; because the assumption is but an indemnity, and the grantor not being liable, the indemnity, is practically a mere nullity. *Crowell v. Hosp. of St. Barnabas*, *ubi sup.*; *Norwood v. De Hart*, *ubi sup.*; *King v. Whitely*, 10 Paige 465; *Trotter v. Hughes*, 12 N. Y. 74. Nor does the fact that the grantee obtained the benefit of the mortgage by having the amount allowed to him as part of the purchase-money, make any difference. The purchase-money was payable to his grantor, and the assumption is to him, and in his favor. The fact of the allowance to the grantee of the amount of the mortgage as part of the purchase-money, merely raises in equity, an obligation on his conscience to indemnify his grantor. *Tichenor v. Dodd*, 3 Gr. Ch. 454. In that case, the suit was by the grantor, who was the obligor in the bond secured by the mortgage, and who had been compelled to pay deficiency against his grantee. The property

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was conveyed to the latter, subject to the mortgage, the mortgage being allowed to him as part of the consideration of the purchase. Obviously, the fact that the mortgagee may, in the event, avail himself of the assumption for the payment of the debt, does not make the assumption any more than a mere incident. It is on the ground that it is an indemnity that the mortgagee claims the benefit of it. "It is immaterial," says Mr. Story, "whether the covenant with the vendor be to pay the debt or to indemnify him against it. But if the mortgagee be a party to the transaction, the vendee covenanting with him to pay the debt, and the estate be subjected to a fresh proviso for the same reason, it will be considered, with respect to the purchase and its representatives, as a purchase of the whole estate, and not of a part, subject to redemption, merely; and the same principle, of course, will apply where, upon the purchase, the mortgage is transferred to the mortgagee, who advances a further sum of money." 2 *Wills* 559, 560; see, also, *Ram on Assets* 441, 442. "The mortgagee," says Judge Story, "becomes entitled to an estate in the land to a charge, and then covenants to pay it, the charge still remaining primarily on the real estate, and the covenant is only a security, because the debt is not the original debt of the mortgagor." 2 *Story's Eq. Jur.* § 1248; see, also, §§ 1246, 1247, 1248 c. In *McLearn v. McLellan*, 10 *Pet.* 625, a testator, who had suffered a judgment against him, which, in the state where he resided, entered, bound both his personal and real estate for payment of the purchase-money of a rice plantation. He gave, by his will, the plantation and his personal property to his son. The son, to obtain possession, gave his bond and a mortgage on the real and personal, for an unpaid balance due on the judgment. It was held that the bond and mortgage did not create, or was not intended to create, any new lien on the personal property, and therefore threw no additional burden on the person of the son. But it is unnecessary to discuss the subject further. The rule has not only the sanction of principle and frequent and authoritative precedent, but has, in England and New York, had the approval of legislative enactment.

The decree of the orphans' court will therefore be affirmed, with costs.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
NOVEMBER TERM, 1880.

THE CITIZENS COACH COMPANY, appellants,

v.

THE CAMDEN HORSE RAILROAD COMPANY, respondents.

1. The right acquired by a horse railroad company, under a legislative grant authorizing it to lay rails in a public highway, and to run cars thereon, charging fare, is such as entitles it to exclude from the habitual and continuous use of its tracks all companies and persons engaged in carrying passengers for hire, in competition with it.
2. That the right of a horse railroad company is thus exclusive, is not inconsistent with the view that such a railroad, laid on a public highway, is only a modification of the public use to which the highway was originally devoted, and not an additional burden on the land for which compensation may be required.
3. The right of the horse railroad company arises from the legislative control of the public easements of highway. The legislature may, when it deems it judicious to do so, grant to a private corporation some interest in the public highway, imposing on it a duty and obligation to provide for public travel thereon in a mode promotive of the public good. In such case the public easement remains unchanged in character or degree. The private corporation

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acquires so much of the public use as is necessary for the purposes of its grant and other public uses are limited and restrained for the attainment of such purposes.

4. Arising from the legislative requirement that the rails shall be laid on the level of the highway, and of a width corresponding to the wagon-track established by law, there is an implied permission, on the part of the horse railroad company, to the use of the track by other vehicles to some extent. Such permission does not emanate from the company so as to be revocable by it. It results from the nature of the grant, and is in the form of a condition resulting from the grant and its acceptance. The use, however, thus impliedly permitted is only such as is consistent with the grant to the company, and not destructive of its purpose. Any use inconsistent with the grant, and destructive of its purpose, is excluded.

On appeal from the decree of the chancellor, reported in *Camden Horse Railroad Co. v. Citizens Coach Co.*, 4 Stew. Eq. 52.

Mr. A. C. Scovel, for appellant, cited—

Brooklyn Central v. Brooklyn C. R. R. Co., 25 Barb. 364; *Hinchman v. Puterson Horse R. R. Co.*, 2 C. E. Gr. 75; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 5 C. E. Gr. 62; 1 Redf. on Railways (2d ed.) 329; 2 C. E. Gr. 80; *Hegan v. Eighth Ave. R. R. Co.*, N. Y. 382; *Shea v. Potrero & Bayview R. R. Co.*, 44 Cal. 422; *Id.* 416; *Brooklyn City R. R. Co. v. Coney Island R. R. Co.*, 35 Barb. 371; *Wilbrand v. Eighth Ave. R. R. Co.*, 3 Bosw. 322; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, Barb. 370; *Sixth Ave. R. R. Co. v. Kerr*, 45 Barb. 140; *Fletcher v. Dickenson*, 22 How. Pr. 248; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 33 Barb. 420; *Jersey City & Brooklyn R. R. Co. v. Jersey City & Hoboken R. R. Co.*, 5 C. E. Gr. 61; *Barker v. Hudson R. R. Co.*, 4 Daly 274; *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen 269; *Adolph v. Central Park, N. & E. River R. R. Co.*, 65 N. Y. 554; S. C., N. Y. 533, 535, 536; *Albany Law Jour.* (May 26th, 1877), 4 C. E. Gr. 14; *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180; *Com. v. Tenney*, 14 Gray 74; *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 222; *Baxter v. Second Ave. R. R. Co.*, 3 Rob. 516; *Adolph v. Central R. R. Co.*, 33 N. Y. Superior Ct. 187, 188; P. L. of 1877—

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225 § 30 ¶ 7; *P. L. of 1871* p. 247 (§ 76 of charter); 103 *Mass.* 206; *P. L. of 1866* p. 643; 2 *C. E. Gr.* 80; 2 *Stew. Eq.* 299; *Hilliard on Injunctions* § 23; *Stew. Dig.* p. 61 §§ 32, 33; 2 *Stew. Eq.* 299.

Mr. D. J. Pancoast, for respondent, cited—

3 *Kent's Comm.* (12th ed.) 458; *Ang. & Ames on Corp.* (9th ed.) § 4; *Angell on Highways* (2d ed.) 28; *Wait's Actions and Defences* vol. 5 p. 338; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 5 *C. E. Gr.* 69; *Brooklyn R. R. Co. v. Brooklyn City R. R. Co.*, 32 *Barb.* 372; *Troy & Lansingburg R. R. Co. v. Collins*; *Newburg Turnpike Road v. Miller*, 5 *Johns. Ch.* 101.

Mr. P. L. Voorhees, for respondent, cited—

Mayor of Jersey City v. Jersey City R. R. Co., 5 *C. E. Gr.* 366; *Hinchman v. Paterson Horse R. R. Co.*, 2 *C. E. Gr.* 75; *Paterson & Passaic R. R. Co. v. Mayor of Paterson*, 9 *C. E. Gr.* 158; *Brooklyn City R. R. Co. v. Coney Island R. R. Co.*, 35 *Barb.* 264; 1 *Redf. on Railways* p. 540 § 6; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 *Barb.* 358, 370, 372; *Davis v. Mayor of New York*, 14 *N. Y.* 506, 515, 516; *Brooklyn City R. R. Co. v. Coney Island R. R. Co.*, 35 *Barb.* 364, 371, 372; *Brooklyn Central & Jamaica R. R. Co. v. Brooklyn City R. R. Co.*, 33 *Barb.* 420, 421; 1 *Redf. on Railways* p. 317 §§ 7, 8, p. 318 §§ 9, 10, p. 320 § 15; *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 *Allen* 262, 269, 270; *Commonwealth v. Temple*, 14 *Gray* 69, 74, 77; *Metropolitan R. R. Co. v. Highland R. R. Co.*, 118 *Mass.* 290; *Hegan v. Eighth Ave. R. R. Co.*, 15 *N. Y.* 380, 382; *Whitaker v. Eighth Ave. R. R. Co.*, 51 *N. Y.* 295, 299; *New York & Harlem R. R. Co. v. Forty-second St. R. R. Co.*, 5 *Barb.* 285, 287, 309; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken R. R. Co.*, 5 *C. E. Gr.* 61, 71, 72; 5 *C. E. Gr.* 550, 560; *Sixth Ave. R. R. Co. v. Kerr*, 72 *N. Y.* 330; *Adolph v. Central Park, N. & E. River R. R. Co.*, 76 *N. Y.* 530, 537; *Jersey City Gas Co. v. Dwight*, 2 *Stew. Eq.* 242, 249, 250; *Raritan & Delaware*

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Bay R. R. Co. v. Delaware & Raritan Canal Co., 3 C. E. Gr. 5570, 572; *Pennsylvania R. R. Co. v. National R. R. Co.*, 8 E. Gr. 441; 1 Redf. on Railways 317, notes; *Troy & Lansing R. R. Co. v. Collings*, MS. case, Supreme Ct. N. Y. (*Reselaer Co.*), Dec., 1878; *Kent v. Morgan*, 2 Keen Ch. 2; *Cooley on Const. Lim.* 544; *Glover v. Powell*, 2 Stock. 211, 2; *Delaware & Raritan Canal Co. v. Raritan & Delaware Bay R. Co.*, 1 C. E. Gr. 321, 378; *Hilliard on Injunctions* 392 & *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, Pick. 512, 525; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 8; *Newburg Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 611; *Ogden v. Gibbons* Johns. Ch. 150, 160; *Agar v. Regent's Canal Co.*, Coop. . 77; *Shard v. Henderson*, 2 Dow 519; *Packer v. Sunbury & N. R. R. Co.*, 19 Pa. St. (7 Harris) 211, 218; *Kerr on Injunctions* p. 199 §§ 3, 4, p. 201 § 5; *High on Injunctions* 212, 2; *Eden on Injunctions* 231; *Hilliard on Injunctions* 393, 5; *Kerlin v. West*, 3 Gr. Ch. 449; *Kerr on Injunctions* p. 199 p. 542 § 4; *Livingston v. Van Ingen*, 9 Johns. 507, 562, 5; *Thompson v. New York & Harlem R. R. Co.*, 3 Sandf. Ch. 4

The opinion of the court was delivered by

MAGIE, J.

An act of the legislature, approved March 23d, 1866 (*P. of 1866* p. 640), created the Camden Horse Railroad Company with a capital stock of \$50,000, and the privilege of increasing the same to \$100,000. The company was, by that act, empowered to construct, use and maintain a railroad over certain streets in Camden, the track to be of the width of the wagon track then established by law, and to be laid level with the surface of the streets and in conformity with the grades then thereafter established. Upon the requirement of the city council of Camden, the company were to pay a tax to the city, not exceeding an amount specified in the act. The company was also empowered to construct or purchase suitable vehicles for the transportation of passengers and property over the railroad, and

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was authorized to demand and receive for such transportation such sums as it should think reasonable and proper, not exceeding, however, a certain sum fixed by the act for each trip of a passenger. The act also gave to the company an action against any person who should "willfully or maliciously impair, injure, destroy or obstruct the use of said railroad," and permitted the recovery of three times the damage sustained by the company. The company was also empowered to borrow the money necessary to build or equip said road, and to secure the payment thereof by a mortgage on the "road, lands, privileges, franchises and appurtenances of or belonging to said corporation."

The company thus incorporated shortly afterwards built a railroad through some of the streets of Camden, in substantial accordance with the requirements of the act above referred to. It has since built other roads or branches through other streets in Camden, under the powers given by the above-mentioned act or supplements thereto. It has continued to operate the railroads so built ever since.

In October, 1876, the Camden Horse Railroad Company filed a bill in the court of chancery against the Citizens Coach Company, setting out the facts of the incorporation and organization of the horse railroad company above stated, and the construction of its railroads. The bill charged that the defendant therein had been incorporated on July 29th, 1876, under the general law of this state entitled "An act concerning corporations," approved April 7th, 1875, for the purpose of carrying passengers and property in and about Camden, for compensation, and that it had continually, since its organization, made use of the railroads of the complainant, in the pursuit of its business, by driving its coaches upon and along the railroad track, to the obstruction and hindrance of the use of the railroad by its owner, the complainant. The bill also distinctly alleged that the complainant was entitled to the exclusive use and enjoyment of said railroad, as against the said coach company or any other person seeking to use the same in the business of transporting persons or property. The prayer of the bill was that the coach company should be enjoined from using with its coaches, in the pursuit of

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its business of carrying passengers in and about the city of Camden, the railroad of the complainant.

The Citizens Coach Company, the defendant, filed its answer to this bill, denying that it had made such continuous or obstructive use of the complainant's railroad as was charged, and further, denying the right of complainant to the exclusive use and enjoyment of the railroad in the transportation of passengers.

Upon the issue thus formed proofs were taken, and upon the pleadings and proofs the chancellor concluded that the complainant was entitled to relief, and an injunction was decreed, restraining the defendant from using with its coaches, in the pursuit of its business of carrying passengers in and about the city of Camden the railroad of the complainant, in competition with the complainant in its business of carrying passengers and property thereon, and from obstructing or hindering complainant in the use of its railroad tracks. The decree further provided, however, that it was not to be construed as restraining defendant from "using the tracks incidentally to the use of the street."

From that decree the Citizens Coach Company has appealed to this court, and now contends not only that the evidence in the cause did not justify the court below in holding that it was using the railroad tracks obstructively, but that no right exists in the railroad company to exclude its coaches from the use of the railroad track, although engaged in carrying passengers for hire in competition with the railroad company.

The first contention it is unnecessary to stop to consider. The evidence seems to be ample of such a continuous and obstructive use of the railroad track by the coaches of the coach company as greatly to interfere with and impede the horse railroad company in its use of its track. Whether this alone would justify an injunction before action at law might be questionable.

But the main question in this case is presented by the other contention of the appellant. It is a question of very great importance, not only to the parties to this cause and those interested in them as stockholders or otherwise, but also to the stock and bondholders of the numerous horse railroad companies

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organized and operated in this state under grants substantially similar to that in question in this case. It requires the consideration and determination of the nature and extent of the rights acquired by a horse railroad company under such legislation as appears in this case, with respect to the public highways on which the rails of its track are laid.

The question of the rights of such a company with respect to the owners of the land under the highway on which the track is laid has been the subject of much judicial consideration. The question has arisen upon the demand of the land-owner to be awarded compensation for the occupation of his land by the railroad. He has contended that such an occupation of the public highway imposed upon his land a burden greater than that which it sustained before, and which amounted to a taking of his land, or some interest therein, for which he was entitled to compensation. On the other hand, the railroad companies have contended that the occupation of the highway by the track and its use by the cars was no other or different use than that public use to which the highway was originally devoted.

A similar question had arisen in the early periods of the history of railroads designed to be operated by steam-power. With a limited and imperfect knowledge of the extent of development to which such roads were destined to attain, or with an exaggerated or distorted view of their character as public highways, it was long contended that such railroads might occupy the soil of ordinary public highways without making compensation to the land-owner. Much difference of judicial opinion and decision may be found on this subject. In this state, in the case of *Morris and Essex R. R. Co. v. Newark*, 2 Stock. 352, Chancellor Williamson expressed the opinion that the legislature might authorize a railroad operated by steam to be laid on the public highway, and that if the occupation did not entirely destroy the use of the highway in the ordinary mode, it was not such a taking of private property as required compensation to be made. On the other hand, the supreme court, about the same time, in the case of *Starr v. Camden and Atlantic R. R. Co.*, 4 Zab. 592, held that the owner of land under a public highway taken by a

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It is obvious, however, that an ordinary horse railroad, occupying a highway with its track, and making use of it with its cars, produces a different result from that produced by such an occupation and use by a railroad operated by steam. By legislative direction, the track of the horse railroad is required to be (as in this case) so constructed not only as not to interfere with or prevent the passage of other vehicles, but to be adapted to such passage both across and along the rails. The cars are drawn by animals such as usually draw the vehicles used on public highways. They carry along the highway such passengers as otherwise would be obliged to pass over it on foot or in other vehicles, and do so with no more injury in the way of noise, jar

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I do not hesitate to adopt this view, sanctioned by such authorities and so reasonable in itself, and to conclude that, so far as the owner of land under a highway is concerned, the use of the highway, by legislative sanction, by a horse railroad is not inconsistent with the public use to which the highway was originally devoted, and is not an additional burden imposed on the land, but only a variation or modification of the public right and easement originally acquired. Consequently, such owner has no right to claim compensation for such occupation of the highway.

While this view has been adopted by many courts, it has also been controverted by judges of repute, and the decisions are consequently very conflicting. No good purpose will be served by a critical examination of the cases in this opinion. It is sufficient to say that, when analyzed, the difference between the cases seems to arise from the different views entertained by the judges in respect to the practical question as to how far the use of the highway by the railroad is incompatible with the use to which the highway was originally devoted. And it may be remarked that when a conclusion, different from that to which I have arrived, has been reached, dissenting opinions have been expressed

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The Citizens Coach Company, the defendant, filed its answer to this bill, denying that it had made such continuous or obstructive use of the complainant's railroad as was charged, and further, denying the right of complainant to the exclusive use and enjoyment of the railroad in the transportation of passengers.

Upon the issue thus formed proofs were taken, and upon the pleadings and proofs the chancellor concluded that the complainant was entitled to relief, and an injunction was decreed, restraining the defendant from using with its coaches, in the pursuit of business of carrying passengers in and about the city of Camden the railroad of the complainant, in competition with the complainant in its business of carrying passengers and property thereon, and from obstructing or hindering complainant in use of its railroad tracks. The decree further provided, however, that it was not to be construed as restraining defendant from "using the tracks incidentally to the use of the street."

From that decree the Citizens Coach Company has appealed to this court, and now contends not only that the evidence in this cause did not justify the court below in holding that it was using the railroad tracks obstructively, but that no right exists in a railroad company to exclude its coaches from the use of the railroad track, although engaged in carrying passengers for hire in competition with the railroad company.

The first contention it is unnecessary to stop to consider. The evidence seems to be ample of such a continuous and obstructive use of the railroad track by the coaches of the coach company as greatly to interfere with and impede the horse railroad company in its use of its track. Whether this alone would justify an injunction before action at law might be questionable.

But the main question in this case is presented by the other contention of the appellant. It is a question of very great importance, not only to the parties to this cause and those interested in them as stockholders or otherwise, but also to the stock and bondholders of the numerous horse railroad companies

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organized and operated in this state under grants substantially similar to that in question in this case. It requires the consideration and determination of the nature and extent of the rights acquired by a horse railroad company under such legislation as appears in this case, with respect to the public highways on which the rails of its track are laid.

The question of the rights of such a company with respect to the owners of the land under the highway on which the track is laid has been the subject of much judicial consideration. The question has arisen upon the demand of the land-owner to be awarded compensation for the occupation of his land by the railroad. He has contended that such an occupation of the public highway imposed upon his land a burden greater than that which it sustained before, and which amounted to a taking of his land, or some interest therein, for which he was entitled to compensation. On the other hand, the railroad companies have contended that the occupation of the highway by the track and its use by the cars was no other or different use than that public use to which the highway was originally devoted.

A similar question had arisen in the early periods of the history of railroads designed to be operated by steam-power. With a limited and imperfect knowledge of the extent of development to which such roads were destined to attain, or with an exaggerated or distorted view of their character as public highways, it was long contended that such railroads might occupy the soil of ordinary public highways without making compensation to the land-owner. Much difference of judicial opinion and decision may be found on this subject. In this state, in the case of *Morris and Essex R. R. Co. v. Newark*, 2 Stock. 352, Chancellor Williamson expressed the opinion that the legislature might authorize a railroad operated by steam to be laid on the public highway, and that if the occupation did not entirely destroy the use of the highway in the ordinary mode, it was not such a taking of private property as required compensation to be made. On the other hand, the supreme court, about the same time, in the case of *Starr v. Camden and Atlantic R. R. Co.*, 4 Zab. 592, held that the owner of land under a public highway taken by a

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railroad operated by steam, was entitled to compensation. cases of *Hetfield v. Central R. R. Co.*, 5 *Dutch.* 571, and *A. E. R. R. Co. v. Prudden*, 4 *C. E. Gr.* 386; *S. C.*, 5 *C. E.* 530, indicate that the view taken by the supreme court is correct. And the reason is pointed out by Chancellor Green, in the case of *Hinchman v. Paterson H. R. R. Co.*, 2 *C. E. Gr.* 75, with his usual perspicuity and breadth of view. And considering the developments of the railroads of the country, it is now perfectly obvious that the use of a public highway longitudinally by a railroad operated by steam, is a use entirely inconsistent with and destructive of the public use to which the highway was originally devoted. The rate of speed at which such roads are operated is dangerous to the public who would otherwise use the highway. It makes use of rails not adapted to, but obstructive of, the ordinary public use of the highway by the usual vehicles of travel thereon. The noise, the danger, the obstruction of the road-bed, all combine to make the use of the highway by such a railroad incompatible with its general use as a public highway. In such a case, then, the railroad becomes a manifest burden upon the soil additional to that originally imposed by the public highway, which is a taking of property for which compensation must be made. The question may be considered as set at rest, now in favor of the above views, by a decided weight of authorities, to be found collected in 1 *Redf. on Railways* (5th ed.) 314 seq., and notes.

It is obvious, however, that an ordinary horse railroad, occupying a highway with its track, and making use of it with its cars, produces a different result from that produced by steam. In an occupation and use by a railroad operated by steam. In legislative direction, the track of the horse railroad is required to be (as in this case) so constructed not only as not to interfere with or prevent the passage of other vehicles, but to be adapted to such passage both across and along the rails. The cars drawn by animals such as usually draw the vehicles used on public highways. They carry along the highway such passengers as otherwise would be obliged to pass over it on foot or in other vehicles, and do so with no more injury in the way of noise,

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or disturbance than would be occasioned by the passage of other vehicles. The use, if it be novel and peculiar in its form, is but a modification of the original use to which the highway was devoted when it became a highway. The burden imposed thereby upon the land-owner, so far as the use of his property is concerned, is identical in kind and no greater in degree than was originally imposed on the land when the highway was opened. Such was the view taken by Chancellor Green in the case of *Hinchman v. Paterson H. R. R. Co.*, above cited, and he consequently held that the occupation of a street by a horse railroad was not such a taking of property as would entitle the owner to compensation. This view was mentioned with approval by Chief Justice Beasley, in *State v. Laverack*, 5 Vr. 201, and by Chancellor Zabriskie, in *Jersey City and Bergen R. R. Co. v. Jersey City and Hoboken R. R. Co.*, 5 C. E. Gr. 61, 66, and was followed by the present chancellor, in *Paterson and Passaic Horse R. R. Co. v. Paterson*, 9 C. E. Gr. 158.

I do not hesitate to adopt this view, sanctioned by such authorities and so reasonable in itself, and to conclude that, so far as the owner of land under a highway is concerned, the use of the highway, by legislative sanction, by a horse railroad is not inconsistent with the public use to which the highway was originally devoted, and is not an additional burden imposed on the land, but only a variation or modification of the public right and easement originally acquired. Consequently, such owner has no right to claim compensation for such occupation of the highway.

While this view has been adopted by many courts, it has also been controverted by judges of repute, and the decisions are consequently very conflicting. No good purpose will be served by a critical examination of the cases in this opinion. It is sufficient to say that, when analyzed, the difference between the cases seems to arise from the different views entertained by the judges in respect to the practical question as to how far the use of the highway by the railroad is incompatible with the use to which the highway was originally devoted. And it may be remarked that when a conclusion, different from that to which I have arrived, has been reached, dissenting opinions have been expressed

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by judges whose opinions are entitled to respect. See 39 N. 404. The cases may be found collected in 1 *Redf. on Railwa* (5th ed.) 317 and notes. In the late case of *All'y-Gen. v. Metropolitan R. R. Co.*, 125 Mass. 515, the supreme court of Massachusetts reach a conclusion in accord with that to which we have arrived.

The discussion, so far, may seem, perhaps, to be somewhat beside the real question in this case. But its applicability may be recognized when it is understood that it is insisted that the conclusion to which we have arrived compels us to adopt a view of the case adverse to the claim of the appellee. It is insisted that if the property-owner be not entitled to compensation, on the ground that the burden on his land is not increased by the use of the highway by a horse railroad, but that such use is a mere modification of the public easement before taken, then it follows that the public right must continue and remain, as before, open to every person. It is claimed that a use of the highway which would exclude, in whole or in part, a portion of the public is incompatible with such use as the highway was originally devoted to, and therefore that it cannot be consistently held that any exclusive rights are vested in horse railroad companies.

I am unable to see any force in this objection. When a highway has been once taken for public use, the owner of the land retains his title to the same, subject to the public easement. That public easement vests in the public. How far it extends it is not necessary now to inquire. Whether it gives power for the laying of underground or the building of elevated railroads need not be considered. It is sufficient to consider the easement as one of a right of passage over the same by the public. That right, however, the legislature may, it is well settled, control. It may control the road for the public use; it may regulate the public use. Thus, it will be conceded, changes of the grade of highways may be made by the public authorities, and the landowner is entitled to no compensation or redress, however injurious or destructive such changes may be, unless under the provisions of such a statute as exists in this state. Rev. 1009. The public may, without further compensation, lay sewers in the

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highway. *Stoulinger v. Newark*, 1 Stew. Eq. 446. Water-pipes, it seems, may be laid within the highway as part of the original burden, at the legislative will. *Jersey City v. Hudson*, 2 Beas. 420. And in the well-considered case of *Wright v. Carter*, 3 Dutch. 76, the supreme court, Chief Justice Green delivering their opinion, held that the legislature might authorize a turnpike company to take a public highway and construct its turnpike thereon, without making compensation to the land-owner whose lands were thus appropriated. The act, which was the subject of consideration in that case, provided for the vacation of the public highway by surveyors of the highways, and it appeared, in the case, that it was so vacated for the purposes of the turnpike. It also appeared that the turnpike company were authorized to charge tolls for all persons traveling thereon. But the court held that the public easement originally acquired over the land was not thereby discharged, and although transferred to a private corporation authorized to exact tolls from travelers and empowered to exclude all who did not pay toll to them, remained yet the same public easement, and was not an additional burden on the land for which compensation could be required. This decision it is unnecessary to vindicate or support in this court, because, although the case of *Wright v. Carter* was afterwards reversed (no opinion appearing in the reports), it is understood that the reversal was upon other grounds, and that the opinion of the court below, on the point in question, was approved. 3 Dutch. 685, note; *State v. Laverack*, 5 Vr. 207; *Freeholders v. Red Bank Turnpike Co.*, 3 C. E. Gr. 93. But I think the decision may well be vindicated upon plainest principles. The public easement requires for its beneficial use the making and maintenance of a roadway. The legislature, representing the public, may well determine whether this shall be done by the public, and at its expense, or by a private corporation. In the latter case it may give to such corporation a right to exact reasonable tolls, to remunerate it for its outlay and labor. The object is not the benefit of the private corporation. That is merely incidental. The real design is the public good in the use of the public highway. If that can be best served, in the judgment of those rep-

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resenting the public, by making a turnpike thereon, it may properly be done. Manifestly, then, no additional burden is thereby imposed on the land-owner. See, also, *Benedict v. Goit*, 3 B.C. 459.

I do not perceive, therefore, that the use of the highway by a horse railroad company, if held to be exclusive of its use to so great an extent by others, is thereby an additional burden on the land-owner. Nor can I see any inconsistency in holding that the land-owner is not entitled to compensation, although the use is more or less exclusive. Such use is, in fact, but a modification of the original public use, established by the representatives of the public, to serve the public purpose in the transportation of passengers upon the highway. It is for the legislature to decide if this is a judicious and proper mode of use for the public good. If it is so considered, then the legislature may authorize it, and may limit and control other public uses of the highway for that purpose. So long as the use made is of the same kind as that to which the land was originally devoted, the owner cannot complain of any modifications or limitations of it.

Let us next inquire what rights a horse railroad company acquires by the legislation with respect to other persons making use of the highway in passing and repassing thereon. Are its rights merely those of passage back and forth upon the road upon which it has been permitted to lay upon the public highway. Or has it the power of excluding others from the use of the rails, and if so, how far does that power extend?

The grant in this case must be conceded to be of a franchise. It includes the right to lay down tracks, to run carriages thereon to carry passengers, and to exact tolls. Such a grant must be construed as giving all the powers reasonably necessary to accomplish the manifest object. *M. & E. R. R. Co. v. Sussex R. R. Co.*, 5 C. E. Gr. 542. That it contains no words of exclusion, is of no consequence, for the grant of a franchise, by its intrinsic force, is exclusive against all persons but the state. *R. & D. Bay R. R. Co. v. D. & R. Can. Co.*, 3 C. E. Gr. 546, 572. As was well said by Chief Justice Shaw, in *Commonwealth v. Temple*, 14 Gray 7: "The accommodation of travelers, of all who have occasion

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use them, at certain rates of fare, is the leading object and public benefit for which these special modes of using the highway are granted, and not the profit of the proprietors." "The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement." "Every such grant must, therefore, be held to carry with it all incidental rights which are necessary to its full use and beneficial enjoyment. When the grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement."

Upon such grounds horse railroad companies have been held to have certain exclusive rights, because the exercise of such rights is plainly necessary to the existence and beneficial use of the railroad. Thus a horse car is held to be entitled to the exclusive use of its track, so that another vehicle in meeting it, is, contrary to the usual rule of the road, required to give way and entirely remove from its track. A similar rule is adopted when the horse car overtakes a vehicle proceeding in the same direction, or encounters a vehicle lawfully stopping in the street to deliver goods, &c. *Commonwealth v. Temple, ubi sup.*; *State v. Foley, 31 Iowa 527*; *Hegan v. Eighth Ave. R. R. Co., 15 N. Y. 380*, and other cases cited in the chancellor's opinion.

It has also been held that a horse railroad company may exclude from its tracks the cars of another horse railroad company, though given authority to use such tracks by the legislature, unless compensation is required to be made. *J. C. & Bergen R. R. Co. v. J. C. & Hob. R. R. Co., 5 C. E. Gr. 66*; *S. C., 6 C. Gr. 550*; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358*; *Metrop. R. R. Co. v. Quincy R. R. Co., 12 Allen 262*. Now the use of one railroad by the cars of another company may be objectionable, because it is probable, and almost certain, that such use would be incompatible with its full use and enjoyment by the company that laid it. But it is not difficult to conceive of cases where it would be quite possible to run cars on other railroads, at least for short distances, without interfering with the regular use of the road by the owners. And so in the cases

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As cited, the ground of the decision has been, not that there was an interference with the full use of the railroad, but that there was such an occupation of the property and franchise of the railroad company as was manifestly a taking or appropriation of property for which compensation might be required, and must be provided. Such was the view taken by Chancellor Zabriske in the case in *5 C. E. Gr. 66*, above cited. The iron rails of the railroad laid in the street, he held to be the property of the railroad company, not abandoned to the public or to every one by those passing over the street. Such use as was incidental and occasional was held to be justified by an implied permission arising from the mode in which the track was required to be laid. But such use was held not to include the use of the track for a competing traffic by the regular running, over the rails, of cars or carriages adapted to the track and operated by a railroad company. When that case came into this court by appeal, a dissent was expressed from the views of the chancellor. The decision here virtually conceded their correctness, so far as the right of compensation was dependent on a franchise and property in the railroad. But this court held that compensation for appropriation of the property had been substantially provided for in the legislative scheme. See *6 C. E. Gr. 557*.

Now if a railroad company have a property in their track on the highway, and in their franchise of operating it for which entitles them to compensation for the use of it by a car company, on what substantial ground can it be denied the same right when a like use is made of its track by coach omnibuses of competing companies? It is true that there may be a vast difference in the degree to which a railroad company would be interfered with, whether the interference proceeds by use by cars or by coaches capable of being turned off the track; but, so far as the property and franchise are concerned, the interference is identical in kind. The use in each case is an appropriation of property, which its owner may require compensation be provided for him.

It is urged, with great force, that there is an implication to use the rails thus laid on a public highway, to

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lawfully passing over the public road in the prosecution of a lawful business, and who do not directly interfere with the passage of the cars. It may be conceded that, by the legislative requirement that the rails should be laid and maintained on the level of the road and of the width of the ordinary wagon track, and by the company's acceptance of such terms in the grant, some permission to use the rails is implied. It is a permission not emanating from the company, nor is it revocable by it. It arises from the nature of the grant, and the conditions under which the track is allowed to be laid. So far as its use, by persons driving for pleasure, on journeys, or in ordinary traffic is concerned, such an implication may well arise. Such use is in no way inconsistent with the grant to the company, and is not destructive to its business. It does not affect the company's rights or franchise. It may wear its rails, but that is part of the compensation the company gives the public for its rights. But the implied permission now discussed must not be extended further than is consistent with the purpose and design of the grant to the company. That purpose was to serve the public by a use of the public highway for public travel, whereby a cheap, convenient and regularly-recurring mode of carriage should be provided for all passengers. For that purpose all the powers of the company were given. Undoubtedly a correlative duty devolved on the company to lay its track and to run its cars for the benefit of the public. Under such circumstances, the laying of the rails must be considered a permission to use them only so far as such use is consistent with the grant and its purpose. Clearly the railroad has not become part of the street. The sills, ties and rails are laid on the street, but they are not part of it. They constitute a part of the machinery for the transportation of passengers, and, although placed on the street, no more become part of it than the cars or carriages placed on the rails. *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co., ubi sup.* Retaining thus its property, no permission to use it will be implied, if the use is inconsistent with the grant and its purpose. And there can be no question but that its use for a business competitive with that for which the company was created, is inconsistent with the grant, and tends to thwart its

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purpose and to destroy the usefulness of the company to the public. Permission for a use inconsistent with the grant was not be implied. On the contrary, the implication is of exclusion of such use.

The conclusion then is, that the horse railroad company, complainant below, acquired, by the grant contained in the charter, a franchise and property in its tracks when laid, which is exclusive of the use thereof by other persons or companies, and competition with it in the business of carrying passengers for hire.

The cases cited in the opinion of the chancellor indicate almost universal acquiescence in this conclusion, wherever the question has been raised. In addition to those cases, there may be cited the case of *Buffalo R. R. Co. v. Leighton*, in which, upon a state of facts identical with this case, Chief-Justice Sheldon, of the Supreme Court of Buffalo, at June term, 1865, restrained the defendant from using the tracks of the plaintiff railroad in the business of carrying passengers in vehicles of any other description. The whole subject is admirably summed up in a report to the legislature of Massachusetts, made in 1865, and may be found in *1 Redf. on Railways* 328.

Upon such a conclusion being arrived at, it is quite manifest that the decree below must be sustained. Such an interference with a franchise granted by the state, and exclusive in its character, as is proved to have occurred in this case, may be restrained by injunction. *R. & D. B. R. R. Co. v. D. & R. Can. Co.*, 10 C. E. Gr. 546.

It may be further remarked that any possible right which the coach company may have to the incidental use of the rails for the use of the street, has been preserved by the decree and injunction. No appeal was taken on the part of the complainant below, and I have thought it unnecessary to consider the question presented by this limitation.

BEASLEY, C. J.

The object of the bill exhibited in this case is to prevent the use and obstruction of the complainant's horse railroad, in

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city of Camden, by the Citizens Coach Company, the appellant in this court.

I have had no difficulty in settling in my own mind what the rights, under ordinary circumstances, of the horse railroad company are. The company was duly chartered by the legislature to build their road, and to run cars and other vehicles upon it, and to charge for the transportation of persons and property thereon, provided that such charge should not exceed a certain maximum sum. I regard this grant of power as giving to the corporation on which it was conferred the exclusive right to the use of this road as a railroad. No one, without its consent, can put cars or other vehicles upon such track, for the purpose of using it as a railroad. And further, as a necessary incident, this company acquired the right of way when overtaking or meeting ordinary vehicles.

On the other hand, I have no idea that, by thus having laid this track, such company acquired the exclusive right to use the space so occupied, or any part of such space. That space still remained part of the public street, open, in its entire area, to the use, in the ordinary way, of every citizen. Such citizens, under such conditions, could use, as a part of the street, either transversely or longitudinally, the rails so laid. I would refer only so far to the authorities as to say that, with almost entire unanimity, they maintain this right in the public as against such a chartered right as the one now in question. And it is also obvious that it is upon this foundation alone that the legislative claim, which has been several times sanctioned by the courts of this state, to appropriate the public streets to the use of these railroads, without making compensation to the land-owners whose title extends over the property so applied, can be justified. Nor does it seem to me that any class of persons is excluded from the enjoyment of this public right. A company or a corporation engaged in a business competition with that of this railroad company neither loses nor gains anything by such a relation. The entire street can be used in such a competition to the same extent, and in the same manner, as it is lawful to use it in the pursuit of any other business.

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Such being the relative rights of the public and of the railroad company, the question arises in this case whether, in the matters here complained of, the rights of the latter have been infringed by the appellant. The respondent complains that the appellant has been using its railroad in the transportation of passengers. The latter avers that it has only been using the railroad in such business as a part of the public highway, as it had a right to do. It seems to me that the question is solved as soon as it is determined what is a use of the railroad and what is a use of the highway. The peculiarity of the use of the railroad consists in its continuity; the vehicles remain upon the rail from one terminus to the other, thereby gaining the advantage of avoiding the impediments incident to the uneven surfaces of ordinary road-beds. But when the railroad is used as a part of the highway, there is no such continuity of use. It is true that on such occasions ordinary vehicles will be run, for various distances, upon the rails; but such use of them is accidental and intermittent. I think it results from these definitions that when in the pursuit of any business, the wagons connected with it are run, by way of preference and to the largest extent practicable on one of these railroads, such practice is a use of the railroad. Such use differs very slightly from that which the company makes of its own road. It is true that, in a wide sense, such use is a use of the public street; but, in the same sense, so is that of the railroad company with its cars. Therefore it seems to me that where it is a part of the scheme of a business to use in its prosecution the railroad track in preference to the other parts of the highway, the carrying out of such plan is a use of the railroad, and is a violation of the exclusive franchise which I have said is, in that respect, vested in the railroad company.

And this, I think, is what has been done in the present case. The evidence has satisfied me that the use that has been made of the road of this respondent by the vehicles of the appellant has been the result, not of accident, but of design. It has been quite clearly proved that there has been an understanding, either express or tacit, between the managers of this coach company and their employees, that the road of the respondent was to be

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converted into one of the efficient instruments of its business; and as was to be expected, such understanding has been **put** into effect, utterly regardless of the embarrassments which, **by** such action, were thrown upon the respondent. The road of **the** respondent has not only been used by this rival company to **the** greatest extent practicable, but has been used in such a manner as seriously to obstruct the convenient employment of it by **its** owner. Against the continuance of such conduct the respondent had a right to appeal to the law for protection.

And it is on this same ground that it appears to me that the **relief** by injunction was admissible. These interferences with **the** rights of the respondent being the outcome of an organized **plan**, could not be sufficiently remedied except by the preventive **power** of a court of equity. Occasional interruptions and **invasions** of this franchise, not being parts of a general scheme, would not have justified such interposition, as such wrongs, **being** both public and private nuisances, could have been sufficiently repressed by actions at law or by indictments. Under **such** conditions, these latter methods of redress would have been **the** appropriate and sole remedies. But such repressions would **not** be adequate where the wrong-doing proceeds from a concerted **plan** of operations, because, as the remedy would be aimed at the **effects**, and not at the cause, the result would be the inefficiency, **with** respect to results, that in general attends a great multiplicity of suits.

I have regarded these questions as of considerable importance, **and** have, on that account, preferred to express my own views on **the** subject; and it is in consequence of such views that I shall **vote** to affirm the decree rendered in the court below.

Decree unanimously affirmed.

Emson v. Lawrence.

EPHRAIM P. EMSON, appellant,

v.

JAMES N. LAWRENCE et al., respondents.

On appeal from a decree of the chancellor, reported in *L*
rence v. Emson, 4 *Stew. Eq.* 67.

Mr. Barker Gummere, for appellant.

Mr. Fred'k Kingman, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

These proceedings are highly irregular, but both parties have participated in such informalities. An arbitration and award have been decreed to be void, though no issue has been raised concerning them in the pleadings; and though one of the parties interested in such award is not before the court, and the award has been partly executed, this absent person, of course, cannot be affected by the decree; and as the parties here present have chosen to try this question as between themselves, I have passed by all matters relating to pleadings and procedure.

With respect to the merits I have had some doubts; but as doubt is not a proper ground for a reversal to rest on, I shall vote to affirm the decree.

Decree unanimously affirmed.

Pillsbury v. Kingon.

NEHEMIAH O. PILLSBURY, assignee, appellant,

v.

JAMES KINGON and others, respondents.

1. An assignee, under an assignment for the benefit of the creditors of the assignor, pursuant to the act entitled "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors" (*Rev. 36*), may file a bill to set aside a prior conveyance of lands made by the assignor for the purpose of defrauding his creditors, if the property so conveyed is required for the payment of the claims of creditors, and creditors who were intended to be hindered, delayed and defrauded by such conveyance have presented their claims to the assignee for allowance.

2. Assignees, under the assignment act, and executors and administrators of insolvent estates, are the representatives of creditors, and, as such, may, for the benefit of creditors, set aside conveyances by the assignor or the decedent, in fraud of creditors, to the extent that such property is needed for the payment of debts.

3. *Garretson v. Brown*, 2 *Dutch*. 425, approved; *Van Keuren v. McLaughlin*, 6 *C. E. Gr.* 163, overruled.

On appeal from a decree of the vice-chancellor, reported in *Pillsbury v. Kingon*, 4 *Stew. Eq.* 619.

Mr. Frederick Adams, for appellant, cited—

Englehart v. Blanjot, 2 *Whart.* 240, 244; *Buehler v. Gloninger*, 2 *Watts* 226; *Thompson v. Dougherty*, 12 *Serg. & Rawle* 448; *Moore v. Bonnell*, 2 *Vr.* 94, 95; *Vandoren v. Todd*, 2 *Gr. Ch.* 397; *Knight v. Packer*, 1 *Beas.* 217; *Scull v. Reeves*, 2 *Gr. Ch.* 131; *State, Clark, pros., v. Grover*, 8 *Vr.* 174, 176; *Alpaugh v. Roberson*, 12 *C. E. Gr.* 96; *Stewart v. Kearney*, 6 *Watts* 455; *Pringle v. Pringle*, 59 *Pa. St.* 281; *In re Estate of Koch*, 4 *Rawle* 268; *Miller v. Mackenzie*, 2 *Stew. Eq.* 295; *State, New Jersey R. R. and Trans. Co., pros., v. Hancock*, 6 *Vr.* 537; *Hackettstown ads. Swackhamer*, 8 *Vr.* 192; *Garretson v. Brown*, 2 *Dutch*, 425; *Newkirk v. Morris*, 1 *Beas.* 62, 65;

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Wilson v. Brown, 1 Beas. 246; *Matlack v. James*, 2 Beas. 126; *Van Keuren v. McLaughlin*, 6 C. E. Gr. 163, 168; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Swift v. Thompson*, 9 Conn. 69; *Sixth Ward Building Association v. Wilson*, 41 Md. 506; *Nichols v. Kribs*, 10 Wis. 76; *Hays v. Doane*, 3 Stock. 84, 88; *Melville v. Mount*, 1 Harr. 363; *Hunt v. Field*, 1 Stock. 36; *Curry v. Glass*, 10 C. E. Gr. 108; *Haston v. Castner*, 2 Stew. Eq. 536; *Shurts v. Howell*, 3 Stew. Eq. 420; *Atwell v. Rees*, River Mining Co., L. R., (7 Eq.) 346; *Philhower v. Todd*, Stock. 312, 315; *Tucker v. Moreland*, 10 Pet. 64; *Eaton v. Eaton*, 8 Vr. 108; *Annin v. Annin*, 9 C. E. Gr. 184; *Crawford v. Bertholf*, Sax. 460; *Phillipsburg Bank v. Fulmer*, 2 Vr. 52; *Campbell v. Nichols*, 4 Vr. 82; *Deweese v. Manhattan Ins. Co.*, 6 Vr. 366.

Mr. J. H. Ackerman, for respondent

The opinion of the court was delivered by

DEPUE, J.

The complainant is the assignee of John C. Doremus and William L. Doremus. The bill charges that on the 14th of January, 1878, the said John C. Doremus and William L. Doremus, who were partners, executed and delivered to the complain-

NOTE.—The following additional cases hold that an assignee for the benefit of creditors may set aside fraudulent conveyances made by his assignor before the assignment—in some states, however, the power is statutory: *Kilbourne v. Fay*, 29 Ohio St. 264; *Hallowell v. Baylies*, 10 Ohio St. 537; *Gibbs v. Thayer*, 6 Cush. 30; *Blake v. Sawin*, 10 Allen 340; *Freeland v. Freeland*, 102 Mass. 475; *Lynde v. McGregor*, 13 Allen 172; *Waters v. Dashiell*, 1 Md. 455; *Simpson v. Warren*, 55 Me. 18; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *Shibley*, Long. 6 Rand. 735; *Clough v. Thompson*, 7 Gratt. 26; *Staton v. Pittman*, Gratt. 99; *Doyle v. Peckham*, 9 R. I. 21; *Southard v. Benner*, 72 N. Y. 424; *McMahon v. Allen*, 35 N. Y. 403; *Moncure v. Hanson*, 15 Pa. St. 385; *Turley v. Bullitt*, 35 Pa. St. 308; 22 Alb. L. J. 60, 81.

The following cases deny such right: *Sere v. Pitol*, 6 Cranch 332; *Estabrook v. Messersmith*, 18 Wis. 572; *Browning v. Hart*, 6 Barb. 91; *Leach v. Kellogg*, 7 Barb. 466; *Maiders v. Culvers*, 1 Duv. 164; *Carr v. Gale*, 3 Woodb. & 68; *Flower v. Cornish*, 25 Minn. 473.

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t an assignment of all their partnership and individual property, for the purpose of securing to the creditors of the firm and the individual creditors of the assignors an equal distribution of the partnership and separate property of the assignors, in accordance with the provisions of the act entitled "An act to secure creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors." *Rev. 36.*

Further charges that the firm property embraced in the inventory does not exceed in value the sum of \$895.44, of which more than \$700 are book accounts, a portion of which is probably uncollectible; that the individual estate of William L. Doremus is estimated at the sum of \$654.10, and the individual estate of John C. Doremus at the sum of \$1,200; that firm debts amounting to \$4,345.51, and individual debts of William L. Doremus amounting to \$204.33, had been presented to the complainant, and that the estate in the complainant's hands and mentioned in the inventory is insufficient to pay in full the debts of the firm presented to the complainant.

The bill further charges that the said John C. Doremus, on the 16th of December, 1877, was seized of two tracts of land situate in the township of Montclair, valued at \$7,000 above encumbrances, and that on that day he conveyed the said lands to his daughter, Jane A. Kingon, for a pretended consideration; and that at the time of the said conveyance the said firm was hope-

an assignee may set aside a mortgage or other conveyance void as to creditors for want of registration or other defects. *Rood v. Welch*, 28 Conn. 157; *v. Tiffany*, 25 Ohio St. 549; *Leland's Case*, 10 Blatch. 503; *Barker v. 12 Bank. Reg.* 474; but see *Williams v. Winsor*, 12 R. I. 9; *Lockwood v. 26 Ind.* 124; *Dorsey v. Smithson*, 6 Harr. & Johns. 61; *Van Heusen v. 17 N. Y.* 580.

He states, the assignee may affirm such fraudulent conveyance, and stop creditors from impeaching it. *Butler v. Hildreth*, 5 Metc. 49; *v. Freeland*, 102 Mass. 477; but see *Leiman's Case*, 32 Md. 225; *Vattier*, 3 Blackf. 245.

If creditors bring suit to impeach the assignor's deed, the assignee is a party. *Jamison v. Chesnut*, 8 Md. 34; *Swan v. Dent*, 2 Md. Ch. 111. He cannot recover dividends fraudulently declared and paid by an corporation. *Butterworth v. O'Brien*, 39 Barb. 192; see *Lexington Page*, 17 B. Mon. 412.

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lessly insolvent, being indebted in the sum of \$12,000, where the debts presented to the complainant were parcel; that said conveyance was contrived and intended in fraud of credit, and that the grantee took the said conveyance with knowledge of the insolvency of the grantor, and of the fraudulent purpose with which the conveyance was made.

The prayer in the bill is that the said fraudulent conveyance may be set aside, and that it may be decreed that the premises fraudulently conveyed away were the property of the said JOSEPH C. Doremus at the time of the execution of the said deed of assignment, and became equitably vested in the complainant under the deed of assignment. To this bill a demurrer was filed.

Concisely stated, the case is this: A conveyance of property by an insolvent debtor, in fraud of his creditors; a subsequent assignment by the debtor for the benefit of creditors, pursuant to the assignment act, under which creditors who were hindered, delayed and defrauded by the conveyance, have presented their claims for allowance, and the property in the hands of the assignee insufficient to pay the claims of creditors in full, without resorting to the property previously conveyed away by the debtor. The question on the demurrer is whether, under such circumstances, the assignee has a standing in court to set aside the fraudulent conveyance, and reach the property conveyed away by the debtor.

The proceedings for the collection of claims against the estates of decedents are similar to those against the estates of voluntary assignors (*Gifford v. Black*, 22 Ind. 444), and hence it has been said that an assignment by a decedent void as to his creditors, leaves or vests the property assigned, as assets in the hands of his executor or administrator (3 Wms. on Exrs. 1679; and cases are there cited from Mass., S. C., Tenn., N. H., N. Y., Mich., La., Mo., Vt., Pa., Tex., Me. and Conn.); but such right, in some of the states mentioned is statutory, and in other states is denied. *Dorsey v. Smithson*, 6 Harr. & Johns. 61; *Snodgrass v. Andrews*, 30 Miss. 472; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Brown v. Finley*, 18 Mo. 375; *Merry v. Freemon*, 44 Mo. 518; *Coltraine v. Causey*, 3 Ired. Eq. 246; *Ordronaux v. Helie*, 3 Sandf. Ch. 512; *Benjamin v. Le Baron*, 15 Ohio 517; *Com. v. Richardson*, 8 B. Mon. 93; *Crosby v. De Graffenreid*, 19 Ga. 290; *Beale v. Hall*, 22 Ga. 431; *Choteau v. Jones*, 11 Ill. 300; *Beebe v. Saulter*, 87 Ill. 518; *King v. Clarke*, 2 Hill's Ch. 611; *Winn v. Barnett*, 31 Miss. 653; *Sharp v. Caldwell*, 7 Humph. 415; *Lassiter v. Cole*, 8 Humph. 621; *Martin v. Martin*, 1 Vt. 91; *Peaslee v. Barney*, 1 D. Chip. 331; *Bank of U. S. v. Burke*, 4 Blackf. 141; *Hills v. Sherwood*, 48 Cal. 386; *Georg*

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in fraud of creditors, for the purpose of applying it in satisfaction of the claims of creditors.

No rule of law is better settled than that a conveyance in fraud of creditors is good as between the parties to it. The statute of 13 Eliz. c. 5, which makes void grants and conveyances contrived in fraud, with intent to hinder, delay or defraud creditors, is in express terms limited to those persons whose actions, debts, damages or demands are or may be hindered or defeated by such covinous or fraudulent devices and practices. *Rev. 447 § 12*. It is equally clear that such conveyances are also unassailable by those who hold a derivative title from the fraudulent grantor, and, in virtue of their title, become simply representatives of his interests. An heir or devisee of the fraudulent grantor is exclusively the representative of the latter, and succeeds only to his rights. In no sense can the heir or devisee be considered as representing those whose interests are intended to be defrauded; and on the plain construction of the statute he is disabled from taking advantage of its provisions. The executor or administrator of a solvent estate stands in the same position. As such, he is also the representative of the fraudulent grantor, and has no power to recall a fraudulent grant of chattels for the benefit of the grantor's estate. The same disability will rest upon an assignee, who, in virtue of the instrument of transfer, becomes merely the representative of his grantor, and succeeds only to the rights of the latter.

The material question for present consideration is, whether those who hold by a title derived from the grantor, but who, in virtue of that title, become the representatives of the creditors of

v. Williamson, 26 Mo. 190; Cobb v. Norwood, 11 Tex. 556; Hunt v. Butterworth, 21 Tex. 133; Hammell v. Harrison, 1 Phila. 349); even where the representative alleges that he is also a defrauded creditor (*Moody v. Fry, 3 Humph. 567; Coltraine v. Causey, 3 Ired. Eq. 246*); see further *Bate v. Graham, 11 N. Y. 237; Smith v. Pollard, 4 B. Mon. 66; Cooley v. Brown, 30 Iowa 470; Badger v. Story, 16 N. H. 168*.

But if the fraudulent grantee has been appointed executor or administrator, equity may grant relief against him. *Hampson v. Sumner, 18 Ohio 444; Clayton v. Tucker, 20 Ga. 452; Doolittle v. Bridgeman, 1 Greene (Iowa) 265; Shears v. Rogers, 3 Barn. & Ad. 362*.—REP.

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the grantor, as a class—as, for instance, the executors or administrators of an insolvent estate, or an assignee for the benefit of the grantor's creditors—may not be allowed, in the interest of the creditors, to have a standing in court, to avoid the force of the grants and conveyances of the debtor for the benefit of his creditors.

The leading case on this subject is *Hawes v. Leader*, 270. In that case the defendant was the administrator of the estate of Thomas Cookson. The plaintiff averred, in his declaration, that the said Cookson, for £20 paid by the plaintiff, granted to him certain goods mentioned in a schedule, and covenanted that he, his administrators &c., should safely keep and quietly deliver the goods to the plaintiff on demand, and bound himself in £40 for the performance of that covenant. Cookson died, and the plaintiff demanded the goods of the defendant, who had become administrator, and being refused, brought his action. The defendant pleaded the statute of 13 Eliz. c. 5, and further said that the testator, at the time of the grant, was indebted to divers persons in several sums (naming both the persons and the sums), and that the deed of gift was made of fraud and covin between the defendant and the plaintiff to deceive his creditors named; that the defendant used and occupied all the goods during his life, and after his death, his administration, after his death, was committed to the defendant. The plaintiff demurred, and assigned as grounds of demurrer, (1) that it was not averred that the debts due were unpaid by the defendant to the creditors named; (2) that the plea did not show that the debts were due by specialty, for an administrator was not bound to debts if they be not upon specialty; (3) that the goods were not liable to the creditors in the plaintiff's hands, as an executor, but only in *son tort*, if the deed of gift be fraudulent; (4) that the defendant might never sue for their debts, and then the defendant's plea thereby justify the detainer of the goods forever, and (5) that the defendant was not such a person as is enabled by the statute to plead that plea, for the statute makes the deed void as against the creditors, but not against the party himself, his executor or administrator. On the argument of the demurrer it was held for the plaintiff.

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It will be perceived that, in the case cited, the action was at law, and the pleading being entirely wanting in the averments necessary to put the interests of creditors in the issue, the decision in principle went no further than holding that an administrator, as such, cannot take advantage of the statute where the rights of creditors do not appear to be involved. Certain it is that, by a long line of decisions, it has become settled law that a conveyance of chattels made by a debtor in fraud of his creditors, is void, and the property conveyed is assets for the payment of debts. 3 *Wms. on Exrs.* 1679. At common law, creditors might consider the fraudulent donee as an executor *de son tort*, if he took the goods into his possession after the death of the donor. But it was not considered that the rights of creditors depended altogether on that mode of proceeding; for it was adjudged in *Bethel v. Stanhope*, *Cro. Eliz.* 810, that if the gift of goods be in itself fraudulent, and the covin is expressly found by the jury, then it is utterly void against the creditors by the 13 *Eliz. c. 5*, and the intestate died possessed of them; and when the donee took them it was a trespass against the administrator for which he hath his remedy, and they were always assets in his hands. Where A, being indebted to B, made C his executor, and died, and C, the executor, promised B, on good consideration, that if he could discover any goods, parcel of the testator's estate at the time of his death, he should have his debts satisfied thereout, and the question was whether a lease for years, conveyed to a stranger by the testator in his lifetime, fraudulently, should, in law, be parcel of his estate at the time of his death or not, it was, by the whole court, resolved to be parcel of the testator's estate at the time of his death, for the lease was void against creditors. *Anon.*, 2 *Roll.* 173. Mr. Roberts, in his treatise on Fraudulent Conveyances, says:

"Wherever a man makes a fraudulent gift of his goods and chattels, and dies indebted, the rule, upon the statute of *Eliz. c. 5*, has always been to construe the gift as utterly void against all his creditors, and the debtor to have died in full possession with respect to their claims, so that the effects are just as much assets in the hands of the personal representatives, as to creditors, as if no such attempt to alien them had been made." *Roberts on Fraud. Con.* 592.

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In *Shears v. Rogers*, 3 B. & Ad. 362, the defendant was the person to whom the lease had been assigned by the testator or in his lifetime, in fraud of his creditors, and who afterwards became his executor; but none of the judges mentioned the fact that the defendant might have been held liable as executor *de son tort*, except Pattison, J.; and Lord Tenterden, C. J., puts his decision on the ground that "the authorities show that whenever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession, with respect to the claims of creditors, and the goods are assets in the hands of his executor."

In *Shears v. Rogers* and *Bethel v. Stanhope*, the question arose under pleas of *plene administravit*. The issue on these pleas admitted that the goods and chattels fraudulently conveyed by the deceased were needed to pay debts. In this respect those cases are distinguishable from *Hawes v. Leader*. In *Shears v. Rogers*, the lease had been assigned by the testator to the defendant, in trust for the benefit of the testator during his life, and after his death for the benefit of one of the testator's daughters-in-law. The defendant, after probate of the will, and before he had notice of the plaintiff's debt, delivered the deed of assignment to the husband of the daughter-in-law. He did not deliver the key of the leasehold premises, but the premises were let by the husband to a tenant. In *Bethel v. Stanhope*, the testator made a gift of his goods to his daughter by *covin*, to defraud his creditors, and died. The defendant intermeddled with the goods, and afterwards the daughter, by this gift, took possession of the goods, and after that the administration was committed to the defendant as executor. These cases affirm the power of the executor, acting in behalf of creditors, under some circumstances, to avoid conveyances by a testator in fraud of his creditors. In both cases the goods so conveyed away were held to be assets in the hands of the executor—a result which is not supposable if the executor had no power to retain or recover them, in avoidance of the conveyance of the testator, by setting up the fact that they were granted away by the testator in fraud of his creditors.

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At common law, there could be no executor *de son tort* where there was a rightful executor or administrator, and it was only by giving substantial effect to the statute of Elizabeth that a voluntary donee of chattels was considered chargeable as an executor *de son tort*, if he took possession of them after the death of the donor. *Roberts on Fraud. Con.* 593. Such a representative of a deceased where there is a rightful executor or administrator, is utterly out of place in our system of administration upon an insolvent estate and the distribution of its assets among creditors. In such a condition of the estate of a decedent, the rightful executor or administrator is generally the representative in fact of creditors, and of creditors only, and alone has the capacity to take the steps necessary under the statute to effectuate an equal distribution, among the creditors of an insolvent estate, of the assets which may be made available for the payment of debts. If creditors should sue the fraudulent donee, as executor *de son tort*, or should, by virtue of an execution on a judgment against the rightful executor or administrator, levy on the chattels so granted away, priorities would be obtained contrary to the policy of the statute for the distribution of the assets among the creditors. In *Holland v. Cruft*, 20 Pick. 321, 328, the right of the administrator of an insolvent estate to set aside a conveyance made by the intestate in fraud of creditors, was deduced from the fact that, in such a condition of the estate, the administrator is the trustee and representative of creditors, and, as such, may stand upon their rights, and assert claims which the intestate himself could not have asserted; and that deduction was founded upon the proceedings for the settlement of insolvent estates, in which the executor or administrator is regarded, in the first instance, as the trustee and representative of the creditors, and only secondarily the trustee for heirs or personal representatives. Though one who parts with his property for the purpose of defrauding creditors cannot recover it back, his personal representatives may sue for it for the benefit of his creditors, if his estate be insufficient to pay his debts. *Stewart v. Kearney*, 6 Watts 453; *Buehler v. Gloninger*, 2 Id. 226; *Bouslough v. Bouslough*, 68 Pa. St. 495, 499; *Everett v. Read*,

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3 N. H. 55; *Abbott v. Tenney*, 18 Id. 109; *Cross v. Brown*, 51 Id. 486; *Fletcher v. Holmes*, 40 Me. 364; *McLean v. Weed*, 61 Id. 277, 65 Id. 411; see, also, *Andruss v. Doolittle*, 11 Conn. 283; *Babcock v. Booth*, 2 Hill 181, 186; *Flagler v. Blunt*, *Stew. Eq.* 518; and cases cited in Mr. Perkins's note to 3 W. on Errs. 1782 [1679].

In a court of law, in ordinary cases, by proof at the trial by the production of a decree of the orphans court, and always in a court of equity, the condition of the estate may be ascertained, and, if need be, a classification arrived at of the creditors who are and who are not entitled to the benefit of the statute; and on the settlement of the estate, the assets may be so marshaled and administered, by withholding from heirs, legatees and next of kin all advantages arising from the avoidance of the acts of the decedent, as to give effect to the policy of the statute, which denies to such representatives the power to avail themselves of its provisions for setting aside the fraudulent grants and conveyances of the deceased. The cases on this head in the courts of our sister states are not in harmony; but I think, on principle and good policy, the executor or administrator may be considered as the representative of creditors for the purpose of bringing suits to recover property fraudulently conveyed away by the deceased, when such property appears to be required for the payment of his debts, and that such property, when recovered, will be treated as assets, in the hands of the executor or administrator, only for the purpose of paying debts. Where the property so illegally disposed of consists of lands on which debts become liens by statute, and which may be subjected to the payment of debts by a creditor filing a bill in behalf of himself and other creditors (*Huston v. Castner*, 4 *Stew. Eq.* 697), the executor or administrator, before he can put himself in position to give him a standing for the purpose of reaching such property, must obtain an order of the proper court for the sale of lands for the payment of debts. *Kingsbury v. Wild*, 3 N. 30; *Drinkwater v. Drinkwater*, 4 Mass. 554.

Cases more directly in point with the case in hand are those decided under the insolvent acts of 1 Geo. IV, c. 119, ar

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Geo. IV, c. 57. In *Butcher v. Harrison*, 4 B. & Ad. 129, the assignees of an insolvent under the insolvent act were held to be parties grieved, within the meaning of the statute 13 Eliz. c. 5, so as to enable them to recover of the insolvent and others, parties to a fraudulent conveyance, the penalty given by the statute; and in *Doe, Grimsby v. Ball*, 11 M. & W. 531, the assignee of an insolvent was adjudged capable of recovering lands which the insolvent had previously conveyed away in fraud of creditors. In both these cases, the assignee was regarded, for the purposes of the suits, as the representative of the creditors of the insolvents. In the case last cited, Parke, B., said:

“I think that the assignee of an insolvent debtor represents the creditors for all purposes, and if any fraud exists in a transaction to which the insolvent was a party, that the assignee may take advantage of it. A deed which is void as against creditors is void also as against those who represent creditors.”

Alderson, B., also declared that “if a deed be void as against creditors, the assignee who represents creditors may avoid it.” In *Norcutt v. Dodd*, 1 Cr. & Ph. 100, a bill by an assignee in insolvency was sustained, the object of which was to set aside a voluntary alienation of property of the debtor, who, at the time of such alienation, was insolvent. In the later case of *Holmes v. Penney*, 3 K. & J. 90, the bill was filed by the plaintiff as a creditor and also as an assignee in insolvency, to impeach a settlement by a debtor in fraud of creditors; and in considering the question of parties, Vice-Chancellor Wood said:

“I have no doubt of the right of the assignee in insolvency to sue in this case. In *Doe, Grimsby v. Ball*, Baron Parke and the present lord chancellor decided that an assignee in insolvency might properly represent all the creditors in proceedings to set aside an instrument which any of the creditors might have instituted.”

In the two cases first cited, the assignment was made under the act of 1 Geo. IV, c. 119; in the other two, under the act of 7 Geo. IV, c. 57. In none of the cases was the decision placed on any language in the statute specially empowering the assignee to avoid the fraudulent conveyances of the assignor. In fact,

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neither of those statutes contained any express provision for setting aside conveyances of the assignor in fraud of creditors, and that fact was unnecessarily pressed upon the attention of the court by the counsel, who argued against the authority of the assignee to exercise that power. The capacity of the assignee to appear in court for that purpose was in express words, or inferentially adjudged on the ground that the assignee of an insolvent was the representative of creditors, and, as such, was entitled to take, for their benefit, the same advantage of the statute Elizabeth as the creditors might have taken. This view is conspicuously apparent in the remarks of Baron Parke during argument, and in his judgment in *D. v. Grimsby v. Bell*.

A trustee or assignee in insolvency has been considered as representative of the creditors of the debtor, and, as such, entitled to avoid, in the interests of creditors, his grants and conveyances made in fraud of creditors. *Sicft v. Thompson*, Conn. 63; *Palmer v. Tanager*, 28 Conn. 237; *Shipman v. Essex Ins. Co.*, 29 Id. 245; *Moncre v. Harrison*, 15 Pa. St. 385.

In *Bayard v. Hoffman*, 4 Johns. Ch. 450, Chancellor Kent decided that an assignment of all the debtor's estate, real and personal, in trust for all his creditors, included stock which the debtor had before that voluntarily assigned, to the injury of his creditors, and that the assignee might file a bill to set aside the fraudulent transfer for the benefit of the creditors. That case has been considered as overruled by the courts of New York, in *Storm v. Davenport*, 1 Sandf. Ch. 135, and *Brounell v. Curtis*, 10 Paige 210; but its weight as the opinion of an eminent equity judge is not impaired by the overruling cases. *Storm v. Davenport* was rested on *Mackie v. Cairns*, 5 Cow. 547—a case which bore upon the question very remotely, if at all; and in *Brounell v. Curtis*, Chancellor Walworth founds his opinion chiefly on *Osborne v. Moss*, 7 Johns. 161, which was an action at law against an administrator, and in its circumstances identical with *Hawes v. Leader*, already commented on.

An assignment under the act of the legislature of this state differs in most important particulars from an assignment made by a debtor at common law for the benefit of his creditors. Its

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title indicates the legislative purpose to establish a system for **securing** an equal and just division of the estates of debtors **among** their creditors, and that purpose is clearly evinced by the **provisions** of the act. At common law, a debtor might assign **the** whole or a portion of his property for the benefit of all or a **part** of his creditors. By our statute, an assignment under the **act** transfers all the property of the assignor, whether it be **described** in the inventory or not. In form, the deed of assignment is in the most general terms in its description of the **property** assigned, and the property of the assignor passes by the **assignment**, though it be not included in the inventory annexed **to** it, if it be comprehended within the general terms of the **assignment**; and to be valid under the act, the assignment must **be** for the equal benefit of all the creditors of the assignor, and **all** preferences of one creditor over another are forbidden. At **common** law, an assignment by a debtor to his trustee to pay his **debts** might be rescinded by the mutual consent of the debtor **and** the trustee, where the creditors had not directed the assignment or assented to it or changed their situation in consequence of it. *Bill v. Cureton*, 2 Myl. & K. 503; *Garrard v. Lauderdale*, 3 Sim. 1; *Colyear v. Mulgrave*, 2 Keen 94, note 1. A deed of assignment under the statute, executed, delivered and accepted by the assignee, creates, *ipso facto*, a trust for the benefit of creditors, not to be surrendered or destroyed except by their consent, and a court of equity will execute it by appointing new trustees, if necessary. *Scull v. Reeves*, 2 Gr. Ch. 84, 131; *Alpaugh v. Roberson*, 12 C. E. Gr. 96. Under such an assignment, the trustee, at common law, was compelled to use the assignor's name in suits to recover the property, or upon the choses in action assigned. By the statute, the assignee may bring suit in his own name. At common law the indebtedness of the assignor was discharged only to the extent of actual payment out of the proceeds of the property assigned, unless otherwise expressly stipulated. By the statute, the assignor obtains a full release and discharge as to all creditors who come in under the assignment. The entire proceedings, under a statutory assignment, are regulated by the statute. The act requires the deed

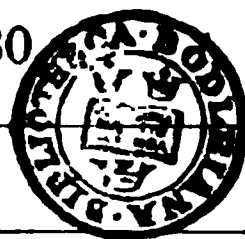
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of assignment to be recorded, and prescribes minutely the duties of the assignee. He is to exhibit to the surrogate of the proper county a true inventory and valuation of the estate assigned; give security for the faithful performance of the trust; give public notice of the assignment; make report of the claims of creditors; make sale and conveyance of property; present his account to be audited and approved by the court; and the court, by citation and attachment, compel the assignee to proceed with the execution of his duties until a final settlement and distribution shall be made. Creditors who come in under the assignment and exhibit their demands for a dividend, are barred from their debts unless they can prove fraud on the part of the debtor with respect to the assignment or in concealing his estate.

A comparison of the statute with the English insolvent law will disclose the similarity of these several acts in all respects material to this investigation. Under each system the assignee derives his title under an assignment which is the voluntary act of the debtor. In the one instance, he is induced to make assignment by the expectation of relief from imprisonment; in the other, by the hope of obtaining a full discharge from debts. The legal effect of the language of the assignment is the same in both instances, except that the position of the debtor in the one case, raises a presumption that he is at that time unable to pay his debts in full, and that part must be made the subject of proof *aliunde* in the other, there is nothing in the situation of the assignor, or in the form of the assignment, which would make the assignee the representative of creditors in the one instance and not in the other. In *Moore v. Bonnell*, 20, 95, the chief-justice said:

“It is difficult to perceive how an assignment, voluntarily made by a debtor for the benefit of his creditor, differs in substance from one executed under the compulsion of an insolvent or bankrupt law. * * * There is to my mind scarcely a shade of difference between the coercion of circumstances impelling a failing debtor to wind up his affairs, and that liquidation brought about by a creditor taking the initiative and proceeding against him.”

Regarding the substantial nature of the transaction, the doc



of the English courts, with respect to the representative character of the assignee of an insolvent, may very properly be applied in favor of an assignee under the assignment act, and the latter be regarded as representing creditors so far as to enable him to take proceedings in their behalf, to set aside conveyances in fraud of creditors, where such property is needed for the payment of debts.

Much of the argument against the power of the assignee to prosecute suits in that behalf for that purpose, was based on the thirteenth and twenty-first sections of the act. I am not disposed to give as much effect to these sections as was given to them in the court below. The thirteenth section gives the assignee the same power to dispose of the estate, real and personal, assigned, as the debtor had at the time of the assignment, with power to settle and compound with any person concerning the same, to redeem mortgages and conditional contracts, and generally to do whatsoever the debtor might lawfully do in the premises. It further authorizes the assignee to sue for and recover in his own name everything belonging or appertaining to the said estate, real and personal, of the said debtor—language which, in view of the purposes of the act, may legitimately be construed to embrace all property which may be made available for the payment of debts. Considering that the assignment creates a trust for the benefit of all the creditors of the assignor, and that the legislative purpose was to secure an equal and just division of the estate of the debtor among his creditors, a construction less comprehensive will defeat the legislative purpose. In virtue of the trust so created the assignee becomes the representative of and actor for creditors, and his powers should be so construed as to enable him to carry into full effect the purpose which the statute designed. In the English insolvent acts, under which assignees are allowed to avoid the fraudulent grants and conveyances of the debtor, the power of the assignee to sue in his own name is granted “for the recovery, obtaining and enforcing any estate, effects or rights of such prisoner”—language, in legal effect, identical with that contained in the thirteenth section of our assignment act. In *Garrison v. Brown*, 2 Dutch. 425, Justice Potts construed this section as enabling the assignee to sue for property fraudulently

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conveyed away by the debtor, and to recover it for the use of the creditors who should present their claims.

The twenty-first section creates a bar of subsequent suits against creditors who have come in under the assignment, liable to be removed only by proof of fraud in the debtor "with respect to the said assignment, or in concealing his estate, real or personal, whether in possession, held in trust, or otherwise." This language manifestly has reference to the conduct of the debtor in connection with his assignment, and has no relevancy to prior conveyances in fraud of creditors, unless such property might be made available to creditors under the assignment; for it is not to be supposed that the legislature would visit on the debtor the penalty of a forfeiture of his discharge for not disclosing to his assignee property which the assignee had no capacity to take under the assignment. The paragraph in this section which saves the rights of creditors who do not choose to exhibit their claims, as to the property, real or personal, not assigned, carries with it an implication that there might be property which would not pass under the assignment; but I do not think that this expression should be allowed to overcome the unmistakable evidence on the face of the statute, that the assignment should embrace all the property of the debtor, and that creditors should be placed on the footing of perfect equality in the division of the debtor's property, or that it was intended to give creditors who stayed out an advantage over those who came in under the assignment.

Nor will any embarrassment be experienced in the fact that the property which has fraudulently been conveyed away may be in excess of what is required for the payment of debts. As is indicated in the opinion of this court in *Miller v. Mackenzie*, 2 *Stew. Eq.* 291, such fraudulent conveyances will be set aside no further than is necessary for the satisfaction of the demands of creditors, and the surplus, if there be any, will not be restored to the fraudulent debtor, but will be returned to the grantee to whom the fraudulent conveyance was made.

In *Garretson v. Brown*, Justice Potts, in delivering the opinion of the court, held that the assignee might sue for and

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the use of creditors, property which the debtor had conveyed away. These views were not expressed on the precise point in issue in the case. But the case turned on the effect of the prior fraudulent conveyances of the debtor on the validity of the assignment, and it is highly probable that the powers of assignees over such fraudulent conveyances entered into the discussions of the able counsel who argued the case, and received a careful consideration by the court. The decision of the supreme court was affirmed in this case. The opinion here, if any was delivered, is not reported.

44. In *Van Keuren v. McLaughlin*, 6 C. E. Gr. 163, Judge Zabriskie adopted a different view, and without reference to *Garretson v. Brown*, held that the assignee could maintain a suit to avoid a fraudulent conveyance of the debtor. That a deed, though void as against creditors, was valid as to the assignee. We think that the views of Mr. Justice with respect to the rights of an assignee under the act are correct, and that *Van Keuren v. McLaughlin* should be

Decree unanimously reversed.

WILLIAM W. CONOVER

v.

MARGARET RUCKMAN.

A county judge has allowed an interlocutory injunction, which afterwards appears to him to have been improperly allowed, he may, of his own accord, set it aside at any time without any notice having been given of his intention to dissolve. The statute, requiring eight days' previous notice to dissolve an injunction, has reference to applications to dissolve an injunction. But, on appeal from an order of dissolution, made under the act, the appellate court will consider only the reasons assigned in the order, for its judicial action.

Property in the hands of a sheriff, raised by him in pursuance of a decree of a court of chancery, are liable to seizure, by virtue of a writ of attachment.

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3. *Crane v. Freese*, 1 Harr. 305, and *Davis v. Mahany*, 9 Vr. 104, approved, *Shinn v. Zimmerman*, 3 Zab. 150, and *Hill v. Beach*, 1 Beas. 31, explained.

On appeal from a decree of the vice-chancellor, reported in *Conover v. Ruckman*, 5 Stew. Eq. 685.

Mr. Chilion Robbins, for appellant.

The appeal in this case raises two questions :

1. Whether money due on a decree of the court of chancery, or about to be paid to, or paid to a sheriff on an execution in his hands to raise money, issued out of the court of chancery, is the subject matter of attachment, and can be attached as a right and credit of the defendant in attachment.

2. Whether an injunction can be dissolved without notice, and upon motion to dismiss the bill for want of equity.

Upon the first question :

It is abundantly established that an attaching creditor has such a lien as will enable him to set aside fraudulent conveyances or judgments affecting the property attached. *Hunt v. Field*, 1 Stock. 46 ; *Williams v. Michenor*, Id. 520 ; *Oakly v. Pound*, 1 McCart. 180 ; *Robert v. Hodges*, 1 C. E. Gr. 299 ; *Curry v. Glass*, 10 C. E. Gr. 108 ; *Rev. 42 §§ 1 3 ; p. 44 §§ 15, 17 ; Shinn v. Zimmerman*, 3 Zab. 150 ; *Crane v. Freese*, 1 Harr. 405 ; *Davis v. Mahany*, 9 Vr. 104 ; *Hill v. Beach*, 1 Beas. 47 ; *Turner v. Fendall*, 1 Cranch 116 ; *Armistead v. Philpot*, 1 Doug. 231 ; *Maxwell v. McGee*, 1 Cush. 137.

Upon the second question :

The rule is plain, that " notices of motions to dissolve injunctions shall be served eight days." *Rule 140*. And so is the statute, " that neither a motion to dissolve an injunction, nor any other special motion, shall be heard unless eight days' notice exclusive of Sunday, and the day of service shall have been given, &c." *Rev. 120 § 86*.

No notice was given of a motion to dissolve the injunction in this case. Without such notice and motion, the action of the vice-chancellor was not warranted. *Manhattan Manfg. and Fer-*

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zing Co. v. Van Keurin, 8 C. E. Gr. 251; 3 Dan. Ch. Pr. 86.

“No motion to dissolve an injunction before answer shall be entertained, except on the ground of want of equity in the bill.”
Rule 122.

Mr. Jacob Weart, for respondent.

The money due on this decree and execution in favor of the respondent, cannot be attached as the property of Elisha Ruckman, who was not a party to the suit either as complainant or defendant in the court of chancery, which court ordered the money to be raised for the respondent. *Conner v. Weber*, 12 Minn. 580; *Thurber v. Blanck*, 50 N. Y. 80.

Money due on a decree of the court, is not a subject matter of attachment, and an attachment served upon money due on a decree and raised by execution is void. *Black v. Black*, 5 Stew. 75; *Shinn v. Zimmerman*, 3 Zab. 150; *Maxwell v. McGee*, 1 Cush. 137; *Hill v. Beach*, 1 Beas. 47; *Crane v. Freese*, 1 Carr. 305; *Davis v. Mahany*, 9 Vr. 104; *Turner v. Fennell*, 1 Cranch 116; *Ross v. Clark*, 1 Dall. 354; *Thompson v. Town*, 17 Pick. 462; *Drake on Attachments* §§ 251, 505, 506; *John Parrott's Case*, Cro. Eliz. 63; *Kerr v. Bower*, Cro. Eliz. 186; *Voorhees v. Sessions*, 34 Mich. 99; *Lightner v. Stein*, 33 Ill. 515; *Reddick v. Smith*, 3 Scam. 451; *Wilder v. Bailey*, Mass. 289; *Dawson v. Holcomb*, 1 Ohio 275; *Morin v. Haw*, 9 Mo. 382.

The general rule is, that a creditor at large has no standing in court of equity by a creditor's bill until he has a lien at law by judgment, and has issued an execution and had it returned satisfied. This principle is so general that no citation of authority is required to support it.

In this state there is a class of cases holding that a creditor by attachment may acquire such a lien by attachment as to support a creditor's bill. *Hunt v. Field*, 1 Stock. 36; *Williams v. Richenor*, 3 Stock. 520; *Robert v. Hodges*, 1 C. E. Gr. 299; *Miller v. Jamison*, 9 C. E. Gr. 41, 11 C. E. Gr. 404; *Curry*

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v. *Glass*, 10 C. E. Gr. 108; *Thurber v. Blanck et al.*, 50 N. Y. 80; *Mechanics and Traders Bank of Jersey City v. Dakin*, 51 N. Y. 519.

The injunction should also have been dissolved for want of equity in the bill. *Austin v. Brown*, 1 Harr. 268.

The opinion of the court was delivered by

DEPUE, J.

Margaret Ruckman obtained a decree in a foreclosure suit, wherein she was complainant, and John Dorn and his wife were defendants. Her bill was filed to foreclose a mortgage, made to her by Dorn and wife. Upon the decree, execution was issued, directed to the sheriff of the county of Monmouth. The sheriff had advertised, and was about to sell the mortgaged premises, to raise the money due on the decree. Conover sued out of the court of common pleas of the county of Monmouth a writ of attachment against Elisha Ruckman, as a non-resident debtor. The writ was directed to the coroners of the county, and was served on the sheriff with a view of attaching the money due upon the decree as the property of Elisha Ruckman.

In this condition of affairs, Conover filed a creditor's bill against Elisha Ruckman, Margaret Ruckman, and the sheriff, charging that the money for which the said mortgage was given, was the money of Elisha Ruckman, and that the mortgage was taken in the name of Margaret Ruckman for the purpose of covering up and concealing the property of Elisha Ruckman, with the intent to defraud his creditors. On filing this bill, duly verified, an injunction was granted, enjoining the sheriff from paying any money raised, or which might be raised, on the said execution, to the said Margaret Ruckman, or any other person, except to pay it into the court of chancery. A motion was made to dismiss the bill, on notice, and without any answer being filed, for want of equity in the bill. The motion to dismiss was denied, but the vice-chancellor, of his own motion, dissolved the injunc-

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The appellant assigned, as one reason for reversal, that the order dissolving the injunction was irregular, in that it was made without the eight days' notice of a motion to dissolve, prescribed by the eighty-sixth section of the chancery act. *Rev. 120*. This reason cannot prevail. If the equity judge has allowed an interlocutory injunction which afterwards clearly appears to him to have been improperly allowed, he may, of his own motion, recall it at any time. Inasmuch as it was in his discretion, in the first instance, to refuse the injunction, he may, in his discretion, set aside the allowance of it if he is satisfied that it should not have been allowed. The section referred to has reference to applications to dissolve made by a party. But on appeal from an order of dissolution, made under such circumstances, the appellate court will consider only the reasons assigned in the court below for its judicial action.

The vice-chancellor vacated the injunction in this instance, on the ground that moneys in the hands of a sheriff, raised by him in pursuance of a decree of the court of chancery, are not liable to seizure by process of attachment, and that the plaintiff in the attachment suit, by the service of the writ on the officer, acquired no rights in or lien upon the moneys, and consequently had no case which would give him a standing entitling him to the assistance of the court.

In *Crane v. Freese*, 1 *Harr.* 305, the effect of the service of a writ of attachment on moneys in the hands of an officer, which he had raised by process of execution, was adjudicated upon by the supreme court. Freese was the sheriff of the county of Warren, to whom an execution had been issued out of the court of common pleas in favor of Aymar, against one Swayze. Crane sued out of the supreme court a writ of attachment against Aymar as a non-resident debtor. The writ of attachment was delivered to Freese as sheriff, and was returned by him with a certificate that he had, by virtue of that process, attached all the goods and chattels, rights and credits, of the defendant in attachment, viz., money in his own hands, collected by him as sheriff on an execution in favor of the defendant in attachment, against Swayze. The case was submitted to the supreme court, on a

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state of the case agreed on, for its opinion thereon. The court held that the money in the sheriff's hands could not be attached as the money of the plaintiff in the execution, for the reason that it could not become his money until it was paid over to him, or in some other way designated as his, or appropriated exclusively to his use. But the court also adjudged that the writ of attachment was well served on the moneys due the plaintiff in the execution and in the sheriff's hands, as rights and credits of the defendant in attachment in the hands of the sheriff; and the duty of the officer, in that event, was pointed out. He was to obey the command of the writ of execution under which he raised the money—bring the money into the court out of which the execution issued, and give notice to the plaintiff in the attachment, or to the creditors, that he had done so; and the court would then control the application of the funds, and protect its officer in the discharge of his duty.

It will be perceived that in the case referred to, the processes were out of different courts—the writ of execution being issued out of the court of common pleas, and the writ of attachment out of the supreme court. The court was of opinion that the moneys in the sheriff's hands, collected by him by execution, were rights and credits of the plaintiff in the execution within the meaning of the attachment act, and were subject to seizure as such by virtue of a writ of attachment against the plaintiff in the execution. Money received by an officer under process of execution may be collected of him by action at the suit of the plaintiff in execution (*Sewell on Sheriffs*. 436; *Dale v. Birch*, 1 Camp. 347), and come within the legal definition of rights and credits as much as debts due from private individuals. The court expressly held that such moneys were liable to seizure by virtue of a writ of attachment against the plaintiff in the execution, as rights and credits belonging to him, and that the court would give effect to the service of the writ of attachment on the officer with respect to such moneys in such a manner as not to involve a disobedience by him of the command of the writ under which the money was raised. The writ of *scire facias* issued against the sheriff as garnishee was dismissed, for the

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reason that it would lead to embarrassment and confusion to permit one process of the court to intercept moneys raised on another while in the hands of the officer; but it was ordered that the sheriff should bring the moneys into court, to be paid over to the creditors in attachment, if no claim to them paramount to the title of the plaintiff in the execution should be interposed.

Crane v. Freese has never been overruled, or doubted, or called in question, in any adjudication in the courts of this state. It has been cited without any expression of dissent from its conclusions, and was directly approved and followed in the recent case of *Davis v. Mahany*, 9 Vr. 104.

The mode of procedure adopted in *Crane v. Freese* has generally been regarded as the settled practice in this state, and has been quite uniformly followed in similar cases. The vice-chancellor, conceiving that the decisions of the supreme court on this question were conflicting, felt bound, in making the order appealed from, by what he considered to be the course of decision in the court of chancery.

An examination of the decisions of the courts of this state on this subject will not disclose any disagreement with *Crane v. Freese* in this particular.

In *Shinn v. Zimmerman*, 3 Zab. 150, the attachment was issued against the plaintiff in a judgment recovered in the courts of Pennsylvania, and was served on the defendant in that judgment. The question for decision was stated by Chief-Justice Green to be "whether a judgment recovered in another state can be attached under the law of this state for the relief of creditors against absent or absconding debtors." The jurisdiction within which the judgment was recovered, and the person on whom the writ of attachment was served, distinguish this case from *Crane v. Freese*. The situation of the parties was such that the course of procedure adopted in that case could not be followed. The defendant in the attachment had recovered his judgment in another jurisdiction, and, as the chief-justice said, there is "no rule of law, no consideration of policy or courtesy, which would or ought to induce any court of Pennsylvania to suspend its process

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and to withhold from one of its own citizens the recovery of a debt adjudged to be due, because after the recovery of the judgment, the debt has been attached under the process of this state." He further remarked that "it was obvious, moreover, that, if executions may thus be arrested, it would, with respect to judgments in this state, as well as elsewhere, present a ready mode of embarrassing the administration of justice and delaying the process of the courts."

The views expressed by Chief-Justice Green in *Shinn v. Zimmerman* are not inconsistent with those expressed by Chief-Justice Hornblower in *Crane v. Freese*. They are, in effect, the same as induced the court in the latter case to deny the power of the attaching creditor to have the attachment levied on moneys in the officer's hands, to be recovered of him by proceedings on *scire facias*—the embarrassment and confusion which would arise from permitting one process of the court to intercept moneys raised on another while in the hands of an officer—a difficulty which was obviated by the mode of procedure at that time adopted. In *Black v. Black*, 5 *Stew. Eq.* 74, the writ of attachment was served on the defendant in a chancery suit, against whom there was a money decree in favor of the defendant in the attachment suit. Service of the writ in that manner directly interfered with the power of the court of chancery to carry into effect one of its own decrees, and the service was declared inefficacious. In *Hill v. Beach*, 1 *Beas.* 31, lands held in trust for a firm were sold under a mortgage, and the attachment was served upon the surplus money remaining in the hands of the sheriff after he had paid over to the complainant in the decree the amount due him, and which the sheriff was ordered by his writ to bring into court. The chancellor held that this money might be attached, and protected the lien which was thus acquired. In his opinion, the chancellor observes that the case in hand was unlike a case in which money was paid into court under a decree or judgment, and by that decree decided to belong to a particular individual; but that observation was made with a view to distinguish that case from *Shinn v. Zimmerman*. The question whether money adjudged to be due to the defendant in the attachment, by a judgment of

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ecree, was liable to seizure under an attachment against him, was not before the court.

The practice established in *Crane v. Freese* has been followed so long to be disturbed. It is a practice which is in furtherance of the policy of the attachment act, which the legislature has declared "shall be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice, and the benefit of creditors" (*Rev. 55 § 75*), and effectually guards against embarrassments arising from conflicting or opposing jurisdictions. The opinion of Mr. Justice Scudder on this topic in *Davis v. Mahany* is so full and exhaustive that it is only necessary to refer to it, and to express our concurrence in his reasoning, and in the conclusion he arrived at.

We think this practice should be applied to the service of writs of attachment on moneys raised under decrees in chancery, and in the hands of officers by virtue of executions issued thereon. Between a decree in chancery and a judgment of a court of law there is no material difference in the nature of the adjudication. In each a court has adjudged that the money found to be due is due and payable to the successful party. Nor do the executions thereon differ in any important particular. By the execution on a decree, the sheriff is commanded to make the money by the sale of the mortgaged premises, or in some manner otherwise designated, and pay it over to the complainant or his solicitor; the execution on a judgment at law commands the sheriff to make the money recovered by the sale of the property of the defendant, and to have it in court on the return day to render to the plaintiff. Service of a writ of attachment on the sheriff having the money in hand will have no greater tendency to create embarrassments, or interfere with the proceedings of the court in one case than in the other. Under the course of practice pursued in *Crane v. Freese*, the money will be paid into the court by virtue of whose process it was raised, to be withdrawn only by the order or decree of that court. The injunction order in this case, in effect, merely required the money to be paid into the court of chancery, to be disposed of as that court might direct. The only difference in the situation of affairs in *Crane v. Freese*

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and in the present case is, that in the former case the attachment was issued against the plaintiff in the execution, and in this it issued against a third person. The fact that the title to property attached is nominally in a third person is no obstacle in the way of proceeding against it by a writ of attachment against it as the property of the real owner. Considering the nature of the bill filed by the complainant, the object of his bill, and that the entire proceedings are in a court of equity, we think that no difficulties or embarrassments can, under such circumstances, arise out of conflicting jurisdictions.

The bill charges that the moneys represented by the debt were the moneys of the defendant in attachment, covertly put in his name in the name of the complainant in fraud of his creditors in contravention of the statute concerning fraudulent conveyances, a statute which Lord Mansfield said "cannot receive too liberal a construction, or be too much extended in suppression of fraud." *Cadogan v. Kennet*, *Coup.* 432, 439. The bill further charges that the mortgagee instituted the foreclosure suit, and conducted a final decree to carry that purpose into effect. It prays that that fraudulent scheme may be arrested, and the money so fraudulently attempted to be diverted from the payment of honest creditors be appropriated to the satisfaction of the claims of the creditors.

The case made by the bill, if sustained by evidence, is one that specially commends itself to the consideration of a court of equity for the relief asked, if it can be granted consistently with the rules and practice of the court. As a creditor at large the complainant could have no standing in court to enable him to present his case; but we think he might acquire that position by a writ of attachment against the fraudulent debtor, properly served, and the service of such a writ may be made on a sheriff to whom the execution on a chancery decree was directed and delivered.

In considering this case, we have not overlooked the fact that the moneys directed to be raised by the execution were not actually in the hands of the sheriff when the writ of attachment was served, or when the complainant's bill was filed. The bill charges that the execution was issued and delivered to the sheriff, and that the sheriff was about to set up and sell

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mortgaged premises by virtue thereof. The question whether the service of the attachment was not premature is one not without difficulty. It was suggested, on the argument before this court, by one of the members of the court, but was not raised or discussed by counsel. The fact was mentioned by the vice-chancellor in his opinion, but the case was not decided by him on that ground, and counsel were not heard on that subject in the court below. For the reason already given, we have not examined or considered that question.

As the case stands, we think the order appealed from should be reversed, but without costs.

Decree unanimously reversed.

DANIEL TILLOTSON, appellant,

v.

MARY ANN GESNER, respondent.

1. Where there is a conveyance of land, voluntary on its face, made by a defendant in a suit just before a judgment for a large sum is rendered against him, which would be a lien on the land if such conveyance had not been made, and the evidence fails to show, by strong proof, that it was made in good faith and for a valuable consideration, the specific performance of an agreement with the vendee for the purchase of the land will not be enforced.

2. If the title to land be doubtful, equity will not compel the defendant, in a bill for specific performance, to expose himself to the hazard of litigation.

3. The bill may be dismissed at the hearing, without reference, if, on the pleadings and proofs, the court can then decide the question.

On appeal from the following opinion of the chancellor :

This is a bill for specific performance. By agreement in writing, made August 31st, 1876, the complainant and the defendant, Daniel Tillotson, sen., agreed to exchange land. By it the former agreed to convey to the latter land in Rockland county, New York, described in the agreement as follows: "All the pieces or parcels of land and premises, at Tappan, described in

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the deed of Isaac H. Bartow and wife, of April 5th, 1871, and now the property of said Gesner," for the sum of \$6,000, subject to a mortgage of \$4,000, and the defendant, Daniel Tillotson, agreed to convey to the complainant land in Englewood, in Berge county, in this state, described in the agreement as follows: "Those certain lots and premises described in two deeds; the one of Cornelius H. Banta and wife to the said Tillotson, dated May 1st, 1869, and the other dated March 23d, 1867, given Henry Frank and Daniel Frank, and now owned by the said Tillotson." In the agreement, the valuation of \$10,000 was put on the complainant's land, and the valuation of \$8,250 on Tillotson's property. It was agreed that on the exchanging of the deeds of conveyance, which was to take place on or before the 1st of October then next, Tillotson should pay (lend) to the complainant \$500 in cash, and that the complainant should give him a mortgage on the land to be conveyed by him to her for \$2,750, being the amount of the difference (\$2,250) in the valuations of the properties, and \$500 to be lent. They further agreed that in case of the failure of either of them in any one or all the specifications contained in the agreement, the party failing should forfeit and pay to the other \$500 and brokerage commissions as agreed upon between them. In pursuance of the agreement, the parties respectively took possession of the property to be conveyed to him or her. Tillotson took possession of the Tappan property, moving in with his furniture on or about September 20th, 1876, and the complainant, by Tillotson's permission, took possession of the Englewood property two days afterward. She built a small barn upon it, and otherwise improved it by digging a well, constructing drains &c. &c. Tillotson's son Daniel continued in actual possession of one of the houses on the latter property, but only as tenant of the complainant, under an agreement by which he was to remain until the following spring, at a stipulated rent. On the 2d of October, 1876 (the 1st was Sunday), the complainant, by her agent and her counsel, tendered herself ready to deliver to Tillotson a deed for the property to be conveyed to him, and a mortgage for the \$2,750, with a receipt from the mortgagee in the \$4,000 mortgage for all in

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erest thereon to that time. Tillotson's attorney saying that he was not then prepared to close the matter, asked for an extension of time till the 12th of that month, which was granted, and a memorandum to that effect endorsed on the agreement and signed by him and the complainant's agent. On the 12th, the representatives of the parties met at the place agreed upon, and the before-mentioned deed and mortgage and receipt were delivered to Tillotson's attorney, who, according to the testimony of the complainant's agent, examined them and then returned them to the complainant's agent (who was present), with the remark that the papers were all right, but that he was not prepared to close the matter up, and that he thought that Tillotson intended to pay the forfeit. The complainant's counsel says that on that occasion they formally handed to Tillotson's attorney the deed and bond and mortgage and receipt for interest, at the same time announcing the complainant's readiness to perform the contract, and demanded of Tillotson's attorney a performance on the part of Tillotson; that the attorney took the papers, examined them, and pronounced them correct, and said he had Tillotson's deed to the complainant with him, but had not the \$500 cash. He says that they waited a considerable time for Tillotson, but he did not come, and the attorney said he could not perform the contract without him.

It appears from the testimony that in the early part of November following, Tillotson's attorney said to the complainant's agent that he had a deed for Tillotson's property properly executed in his pocket, and that he would give it to the agent if the latter would give him the bond and mortgage stipulated for in the agreement for \$2,250, waiving the loan of \$500, and added that if the agent would agree to that, he would call at the latter's house the next day and exchange the papers. To this the agent replied that he had promised to pay the \$500 to the mortgagee of the \$4,000 mortgage, and did not intend to break his promise; and the attorney then said to him that he "had better think the matter over and let him know—that he did not see what difference the \$500 made to him, as he got none of the money;" to which the agent rejoined that it made a good deal of difference

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to him as a point of honor. The agent testifies that in that ~~or~~ another conversation the attorney stated that Tillotson was willing ~~g~~ to assume the payment of the principal and the accrued interest ~~st~~ (instead of making the loan of \$500) on the \$4,000 mortgage ~~e~~, which offer he refused. According to the testimony of Tillotson's attorney, the only objection which was made to completing the transaction was the existence of a judgment. That judgment, however, did not appear to be, and was not, a lien on the complainant's property. He says he met the complainant's agent frequently afterwards, and made several propositions to him, by authority of Tillotson, all of which were rejected on the spot. They are important as showing that there was no objection made to the complainant's title. One of them was as follows: Tillotson to convey his property to the complainant and take a mortgage for \$2,750, and when the judgment should have been removed, to lend the \$500 and take the conveyance for the complainant's property, and another was to carry out the agreement according to its provisions (without asking for the removal of the judgment), except that, instead of lending the \$500, which would at once go to the mortgagee of the \$4,000 mortgage, to leave that amount of interest unpaid on that mortgage—Tillotson to pay it when convenient to him. Tillotson's attorney says: "We repeatedly offered to pay the \$500 forfeit, and to pay the broker's commissions [which Tillotson did, in fact, pay], as expressed in the agreement, to end the contract and get back possession of Tillotson's property without a suit." There were what he calls some "ancient defects" (an old mortgage &c.), in the complainant's title, but he says he never made any complaint or objection with regard to them, and they appear to have been remedied. He says that at the meeting of the 12th of October, his chief objection was the judgment, although he adverts to another objection, to which he says he perhaps alluded at the time. This appears to be an objection based on the fact that the description of the complainant's land seems to differ from the actual location; but the location has existed for over thirty years, and the property has been occupied by the complainant and those under whom she claims title, according to it, for that period.

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his objection, if made, seems to have been merely suggested, and not to have been urged or insisted upon. Nor does the evidence show that there was any deceit on the part of the complainant. As before stated, Tillotson repeatedly offered to pay a amount of the forfeit mentioned in the agreement and the brokerage. It does not appear that he ever made any complaint that he had been overreached in the bargain. He says that his property had been for sale in the hands of the agent, Jackson, to whom the exchange was negotiated, for two years before the bargain was made with the complainant, and that that was the way it happened that Jackson broached the subject of the exchange to him; that Jackson spoke to him about the exchange two or three weeks before it took place, and spoke to him or sent him word several times before he went to see the property; that when he went to see the property, he went alone; that he spoke to no one there except the complainant (he is mistaken as to the person—it was Ida E. Gesner), and she invited him in to lunch, which invitation he accepted, but he can remember nothing that was said by her on the occasion in regard to the property, except that she gave a reason for its neglected appearance. He on that occasion examined the property, and says he was dissatisfied with its general condition and situation—that he found it in a bad condition. Immediately after that visit, there were negotiations between him and Jackson and the complainant's agent in regard to the exchange. The complainant's agent offered \$2,000 to boot, and Tillotson refused to exchange on those terms. Jackson brought the parties together again, and told Tillotson that the complainant would give \$2,250 to boot. Tillotson still declined. He afterwards went to see the complainant's property again, and subsequently informed Jackson that he would make the exchange, and lend the \$500 as part of the consideration. All he did was done with deliberation, and there is no evidence whatever of any misrepresentation. It is urged on his behalf, indeed, that the complainant's property was put into the exchange at \$10,000, while it appears to be worth no more than \$4,000; but his own property was put in at \$8,250, and there is no evidence whatever as to its value. He

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swears that the complainant's agent told him that the complainant's property was worth \$10,000 or \$12,000; but the agent denies it, and says that what he said was that it was worth \$10,000 as much as any property in Tappan. But that was relative, and there are no means of judging whether it was even extravagant. It is quite clear, however, that the expression of value, whatever it might have been, was not of a kind to be ranked as a misrepresentation. It was manifestly mere "dealing talk." Mrs. Van Wart, daughter of the complainant, testifies that Tillotson, on the occasion when he first went to see the complainant's property, said he had been around the place, and liked it very much, and thought it a very fine one. The complainant's agent says that when, after Tillotson took possession of the Englewood property, he returned to get some articles which had been left there, he saw Tillotson, and the latter told him to tell his (Tillotson's) son, when he returned to Tappan, that he was "terribly homesick;" and he added that he thought he would not make the exchange—that he was too old to take charge of such a property. Tillotson's son Daniel says that the reason his father left the complainant's property after he had taken possession, was that he was disgusted with the trade; that he had something which he could not shoulder; that he could not get a clear title. He adds that his father told him he would not trade—that he would pay his \$500 (the forfeit), according to the contract. Neither in this nor in any other testimony in the cause is there any complaint or allegation that deceit has been practiced on Tillotson, whether in misrepresentation of value or otherwise. The fact seems to be that he, soon after the exchange, became dissatisfied with the bargain, and was anxious to escape compliance with it. The objection which he makes to the contract—that it is uncertain in its description of the property to be conveyed by him—is entirely untenable. It is based on the fact that in the contract he says that part of his property was conveyed to Henry Frank and Daniel Frank, by deed dated March 23d, 1867, whereas it was conveyed to Henry Frank alone by deed of that date. It is to be observed that he seeks to take advantage of the alleged uncertainty in his own description of his

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ad. But there is, in fact, no room for the objection. It is enough if the property be so described as that it may be ascertained with certainty. *Camden and Amboy R. R. Co. v. Stewart*, 3 C. E. Gr. 489; *Lewis v. Reichey*, 12 C. E. Gr. 240. The reference to Daniel Frank is evidently a mere mistake, which a reference to the deed itself would correct; and, besides, Tillotson admits, in his testimony, that the property claimed by the complainant—the six lots and two houses thereon—is the property which he agreed to convey in exchange.

Nor can the defence that the complainant has an adequate remedy at law, avail the defendants. The provision for forfeiture contained in the agreement was intended as a penalty. *Whitfield v. Levy*, 6 Vr. 149. It applies the forfeiture to any one or all of the specifications; that is, on the part of the complainant, to the sale of her land and the giving of the \$2,750 mortgage; on the part of Tillotson, to the sale of his land and the loan of \$500. Moreover, Tillotson, as he admits in his testimony, and as is otherwise fully proved, gave possession to the complainant under the agreement, and the complainant yielded up to him under the agreement the possession of her property, and he took it. The complainant has expended money in improving the Tillotson property. Tillotson is not in a position successfully to resist the complainant's demand for specific performance with the claim that the complainant has a remedy at law. The contract was partly performed when possession was given and taken. Tillotson will be decreed to perform his contract specifically. Since the commencement of this suit the complainant's property has been sold and bought in by the mortgagee under foreclosure of the \$4,000 mortgage. The complainant, however, tenders herself ready to give to Tillotson a good title to the property, subject to encumbrance equal to the amount of \$4,000, with interest at seven per cent. per annum, from October 2th, 1876. Opportunity will be afforded to her to obtain this title, and also to obtain proper title by deed for so much of her land as is not covered by the deed to her therefor. *Fry on Spec. Perf.* § 872. The delay in bringing suit is accounted for as having been occasioned by the negotiations of the parties for a

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settlement, and it appears very clearly that, in order to prevent proceedings for specific performance, Tillotson pretended to convey by a merely colorable deed, dated June 5th, 1877, to his son Daniel, part of the Englewood property (the part of the property on which Daniel lived when the contract for exchange was made), as is admitted, without consideration; the son merely claiming that it was given to him by his father over four years before the date of the deed. And, with the same object, Tillotson, previously, by mortgage dated August 31st, 1876, but not acknowledged until October 9th of that year, pretended to mortgage the whole property to his son Moses, to secure \$2,750. That mortgage was without consideration, and both it and the deed to Daniel were taken with full notice of the contract. The complainant insists that it was agreed that the mortgage of \$2,750 was to be payable in three years. Tillotson says that there was nothing definite said about the time (the contract is silent on the subject), but adds that he remarked to Mr. Jackson that it was "most customary to make them [mortgages] for one year." By his answer he admits that the mortgage was to be payable in one year. There is no satisfactory proof that the mortgage was to be payable at any more distant period. In the absence of the admission of Tillotson, the contract would be construed as providing for a mortgage payable immediately. *Green v. Richards*, 8 C. E. Gr. 32, 536. The mortgage to be given for \$2,750 will be payable in one year from the time of delivery, with interest on \$2,250 at seven per cent. per annum, from October 12th, 1876, up to July 4th, 1878, and at six per cent. from that time, and on the whole of the \$2,750 at six per cent. from the time of the delivery of the mortgage, and it will contain the usual insurance clause. Both parties admit that the mortgage was to be payable at a future time, with interest, but they differ as to the time.

G. R. Dutton and G. Collins, for appellant.

I. The contract is grossly unfair. 13 Ves. 225; *Torrey v. Buck*, 1 Gr. Ch. 366, 374-5; *Stoutenburgh v. Tompkins*, 1 Stock

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1, 335-6; *Craven v. Sickel*, 1 Ves. 60; *Calverly v. Williams*, Ves. 210; *Cooper v. Dunne*, 1 Ves. 565; *Benedict v. Lynch*, 1 Wms. Ch. 375; *Roach v. Rutherford*, 4 Desauss. 131; *Waters v. Davis*, 9 Johns. 450; *Pratt v. Carroll*, 8 Cranch 471; *Miller v. Underwood*, 1 Gr. Ch. 199, 208; *Ely v. Perrine*, Id. 296; *Stout-ergh v. Tompkins*, 1 Stock. 332; *Plummer v. Keppler*, 11 C. Gr. 481; *Hopper v. Hopper*, 1 C. E. Gr. 147; *Underwood Hitchcox*, 1 Ves., sen., 279; *King v. Hamilton*, 4 Pet. 311; *Seymour v. Delancy*, 6 Johns. Ch. 222; *Rodman v. Zilley*, Saxt. 7, 324, 325; *Savage v. Taylor*, cited in *Seymour v. Delancey*, Johns. Ch. 222; *Pinner v. Sharp*, 8 C. E. Gr. 274, 280; *Wensend v. Stangroom*, 6 Ves. 328; *Mortlock v. Butler*, 10 Ves. 2; *Suffern v. Butler*, 4 C. E. Gr. 205.

II. The contract does not designate with certainty the premises to be conveyed by Tillotson. *Robeson v. Hornbaker*, 2 Gr. Ch. 60; *Underwood v. Hitchcox*, 1 Ves. sen. 279; *Carr v. Asiatic L. & B. Co.*, 4 C. E. Gr. 426; *S. C.*, 7 C. E. Gr. 86; *King Ruckman*, 5 C. E. Gr. 317; see cases cited by defendant in *King v. Ruckman*, 5 C. E. Gr. 330, 331, 332.

III. Complainant's title to Tappan property. Court will not compel a purchaser to take a doubtful title. *St. Mary's Church v. Stockton*, 4 Hal. Ch. 520, 531; *Chambers v. Tulane*, 1 Stock. 46; *Vreeland v. Blauvelt*, 8 C. E. Gr. 483; *Dobbs v. Nor-ross*, 9 C. E. Gr. 327; 2 Pars. on Con. 564; *Johnson v. Hub-ell*, 2 Stock. 332, 342; *Story's Eq. Jur.* 749, 750; *Read v. Livingston*, 3 Johns. Ch. 431, 500; *Lockyer v. Dehart*, 1 Hal. 450; *Lawrence v. Lippencott*, 1 Hal. 473; *Case v. Phelps*, 39 N. Y. 77; *Robinson v. Stewart*, 10 N. Y. 195; *Story's Eq. Jur.* 353; *Fulford v. Tunis*, 6 Vr. 256; *Garr v. Hill*, 1 Stock. 215; *Tantum Green*, 6 C. E. Gr. 369; *De Witt v. Sickle*, 2 Stew. Eq. 209, 215; *Randall v. Vroom*, 3 Stew. Eq. 353; *Story's Eq. Jur.* 369. A voluntary settlement by a person who is indebted, is void as to existing creditors. *Read v. Livingston*, 3 Johns. Ch. 481, 500; *Myard v. Hoffman*, 4 Johns. Ch. 450; *Seward v. Jackson*, 8 W. 406; *Jackson v. Peck*, 4 Wend. 300; *Van Wyke v. Sew-ell*, 6 Paige 62; *Robinson v. Stewart*, 10 N. Y. 190, 195; *1 Story's Eq. Jur.* § 395; *Beekman v. Montgomery*, 1 McCart. 111;

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Smith v. Vreeland, 1 C. E. Gr. 201; *Tantum v. Green*, 4 C. E. Gr. 105; S. C., 6 C. E. Gr. 364, 369; *De Witt v. Van Siclen*, 2 Stew. Eq. 210, 215.

IV. The contract is without mutuality. *Story's Eq. Jur.* 723; *Fry on Spec. Perf.* 286; *Hopper v. Hopper*, 1 C. E. Gr. 147—8; *Stoutenbergh v. Tompkins*, 1 Stock. 342—4; *Johnson v. Hubbell*, 2 Stock. 342; *Welch v. Bayard*, 6 C. E. Gr. 187; *St. Mary's Church v. Stockton*, 4 Hal. Ch. 520, 532; *Cheddick v. Marsh*, 1 Zab. 466.

R. P. Wortendyke, for respondent, cited—

Whitfield v. Levy, 6 Vr. 149; *Cotheal v. Talmage*, 9 N. Y. 551; *Colwell v. Lawrence*, 38 N. Y. 71; *Cusler v. Butler*, 3 C. & P. 240; *Reynolds v. Bridger*, 37 Eng. L. & Eq. 130; *Noyes v. Phillips*, 60 N. Y. 408; *Hoag v. McGinnis*, 22 Wend. 165; *Spear v. Smith*, 1 Den. 464; *Bagley v. Peddie*, 16 N. Y. 464; *Lampman v. Cochran*, 16 N. Y. 275; *Staples v. Parker*, 41 Barb. 468; *Clement v. Cush*, 21 N. Y. 253; *Bage v. Millard*, 12 N. Y. Leg. Obs. 57; *McNill v. Clark*, 7 Johns. 465; *Clum v. Moseby*, 1 Bail. 136; *Welland Canal v. Hathway*, 8 Wend. 480; *Dezell v. Odell*, 3 Hill 215; 1 Addison on Con. 745 § 496; *Hopson v. Trevor*, 1 Str. 533; *French v. Macale*, 2 Dr. & War. 269; *Long v. Bowning*, 33 Beav. 585; *Jackson v. Barker*, 2 Edw. 471; *Beale v. Hayes*, 5 Sandf. 640; *Cheddick v. Marsh*, 1 Zab. 463.

This is a suit for a specific performance of a contract for the exchange of lands. The agreement is in writing, dated August 31st, 1876, and by it the complainant, Mary Ann Gesner, bargained to exchange and convey to the defendant, Daniel Tillotson, several parcels of land and premises at Tappan, Rockland county, in the state of New York, and the defendant bargained to exchange and convey to the complainant certain lots and premises at Englewood, Bergen county in the state of New Jersey, on or before the 1st day of October then next. Tillotson agreed to lend to the complainant \$500, and she contracted to

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ive him a mortgage on the lands at Englewood, to be conveyed to her, for \$2,750, which included the sum of \$500 above named, and \$2,250, the amount to be paid as difference in the exchange of the properties. Other particulars are given in the opinions.

The opinion of the court was delivered by

SCUDDER, J.

In examining this case, the first question which presents itself is in reference to the validity of the title of the complainant to the lands at Tappan which she, by this bill, seeks to force on the defendant against his will. This is the consideration which gives value to the contract; if it fails there is no mutuality in the agreement, and it should not be enforced. This title is based on a conveyance from Isaac H. Bartow and wife to Abraham Van Wart, dated April 5th, 1871. The property described in the deed is that designated in the agreement to be conveyed to the defendant. Isaac H. Bartow obtained this property from John R. Verbryck, by deed dated May 1st, 1849. It is said that the description contained in this deed does not cover the northern part of the lot of land and premises to be conveyed, and there is a small gore of land on the southerly side which is omitted. There is an apparent error in the boundaries of the latter deed, but Bartow and Van Wart have had undisturbed and undisputed possession of the entire lands, as owners, since 1849, and no adverse claim of title is shown. This objection cannot, therefore, prevail.

It also appears, by the agreement, that the property at Tappan was to be conveyed to the defendant, Tillotson, subject to a mortgage of \$4,000. During the controversy between these parties, this mortgage has been foreclosed and the premises sold, and bought in by the mortgagee, but the complainant, in the bill of complaint, offers specifically to perform the agreement in all things on her part, which includes the obtaining of this title and the conveyance of the lands with no greater encumbrance thereon than was stipulated for, and subject to the decree of the court. The defendant will therefore be amply protected from a conveyance of his lands until a proper assurance of the title of the com-

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plainant's lands named in the agreement is made. This has been provided for in the decree made by the chancellor.

Another objection made is, that the complainant, Mary Ann Gesner, held the title by a voluntary conveyance from her son-in-law, Abraham Van Wart, which was made to defraud her creditors, and is voidable by them. The search for title made by the defendant's attorney, after the agreement for exchange had been executed, and after the parties had taken possession of their respective properties under their contract, showed these facts that a judgment of the supreme court of the state of New York was rendered March 8th, 1875, at the suit of Margaret Mann administratrix &c., against Abraham Van Wart and Matilda, his wife, for the foreclosure and sale of mortgaged premises, now named in this agreement, and against Abraham Van Wart for any deficiency that might arise; that, April 29th, 1875, a judgment was obtained in the supreme court of the state of New York, and docketed in Rockland county, in favor of Margaret Mann, administratrix &c., against Abraham Van Wart, for \$1,308.45, the deficiency above named. On April 22d, 1875, seven days before this judgment for deficiency was obtained, Van Wart conveyed this property at Tappan to the complainant Mary Ann Gesner, his mother-in-law, for the consideration therein expressed, of \$1; and on April 29th, 1875, the day on which the judgment was rendered against him, the complainant conveyed the premises to Matilda Van Wart, wife of Abraham Van Wart, for the consideration, therein expressed, of \$1. These deeds were evidently voluntary conveyances, by which the title to these lands was changed from Van Wart to his wife, at the very time of the recovery of the judgment for deficiency against him. The judgment was not a legal lien on the land, because on the day it was recovered, the conveyance had been made to Mrs. Van Wart, the defendant's wife, but if the deeds were made to defraud creditors they were voidable by them, and if the defendant, Tillotson, took title after his searches had disclosed these facts, he would be charged with notice of the fraud, if it existed, and his title could also be assailed by the creditors of Abraham Van Wart. On August 31st, 1876, while the title thus stood

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the name of Matilda Van Wart, this agreement was made for the exchange of these lands, in the name of Mary Ann Gesner, and was signed by Abraham Van Wart as her agent. These acts of alleged fraud on creditors are set out in the defendant's answer, and appear in the proofs.

It is apparent, from the testimony of the defendant and from the evidence of David Van Wart, an attorney, of New York, who acted for his brother, Abraham Van Wart, in the attempts that have been made to effect a settlement between these parties, and to pass the titles, and also from the statements made by Abraham Van Wart, that the defendant's attorney did, at their first meeting after the contract was signed, and at the time appointed for exchange of titles, object to the existence of this judgment. Different projects have been suggested for settlement, but there has been no waiver or release of this objection to the title.

Although the deeds from Abraham Van Wart to Mrs. Gesner, and from her to Mrs. Van Wart, contain only a nominal consideration of \$1, there has been offered in evidence a mortgage given by Abraham Van Wart to George M. Gesner, husband of Mary Ann Gesner, on the Tappan property, dated August 24th, 1871, which, it is said, was part of the consideration of the deed from Van Wart to Mrs. Gesner; and that the deed from Mrs. Gesner to Mrs. Van Wart was given to take effect at the mother's death, instead of a will. The amount is not given in the memorandum of exhibits in possession of the court, but it is not important. George M. Gesner was living, and it does not appear how his wife became the owner of this mortgage, which has never been recorded, nor has any assignment thereof to her been shown. The allegation that this mortgage entered into the consideration of the deed to Mrs. Gesner is thus stated by David Van Wart in his testimony, and this is the only evidence by any witness on this subject :

"I think the main question, primarily, was the good faith and validity of the conveyance from Abraham Van Wart to Mrs. Gesner; it was then stated that the cancellation and surrender of that mortgage was, in truth and fact, part of the consideration of that conveyance."

Nothing more particular is given about this mortgage, or

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how it entered into the consideration of the deed, or was never recorded. After the articles of agreement signed between the parties to this suit, the defendant testifies that he was told by David Van Wart that there was an unrecorded and uncanceled mortgage on the Tappan property that had been held by David Gesner, and that he replied that it should be canceled, now that he had notice of it, for it was the same to them after notice as a recorded mortgage. The mortgage, with an endorsement of satisfaction thereon, was afterwards produced and shown to the defendant's attorney, to satisfy him that it was no longer an existing encumbrance on the property. It is manifest, from this evidence, that Abraham Van Wart controlled this property, and the different title papers relating to it in his own interest, and according to his own will. At the question may be asked, What careful attorney, in connection with this title, would advise a client to take it and pay a full consideration? Or who will say that it would be safe, if the judgment of a creditor of Abraham Van Wart shall bring a suit to set aside the conveyances to Mrs. Gesner and Mrs. Van Wart as void as to the plaintiff?

It is the duty of the court to see that the objections to the title are not frivolous, or intended only to delay and embarrass the complainant; and such objections should not be treated too seriously as to be received as excuses for the non-performance of a contract. But, on the other hand, a court of equity will not compel a party to take and pay for an estate of which an imperfect title can be given. The distinction is also to be made between the case where the apparent defect in the vendor's title is such an one as may be expected to be removed on a proper investigation, and that where it is not, consistently with equity practice, and that where the court will not allow the complainant, seeking a specific performance, to make up a case in this way, but will only dismiss his bill with costs, without prejudice to a new bill. *Blatchford v. Kirkpatrick*, 6 Beav. 411; *Clay v. Rufford*, 19 Eng. L. & E. 350; *Girrer v. Bastain*, 10 Beav. 619; 1 De G. M. & G. 69. The true rule is stated in *10 Con. (6th ed.)* *380, that if the character of the title is so doubtful, although the court were able to come to a conclusion that, on the whole, a title could be made that w

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probably be overthrown, this would not be good title enough; for the court have no right to say that their conclusion, or their opinion, would bind the whole world, and prevent an assault on the title. The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the lands. These statements accord with the conclusions from cases in the notes to *Seton v. Slade*, 3 *Lead. Cas. in Eq.* 67, 79, 87, 88; *Fry on Spec. Perf. ch. xvii.* 347; 1 *Story's Eq. Jur.* 749, and with cases in our own courts: *St. Mary's Church v. Stockton*, 4 *Hal. Ch.* 520; *Chambers v. Tulane*, 1 *Stock.* 146; *Johnson v. Hubbell*, 2 *Stock.* 332, 342; *Vreeland v. Blauvelt*, 8 *C. E. Gr.* 483; *Dobbs v. Norcross*, 9 *C. E. Gr.* 327. In the last case, the chancellor says that the court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings.

Where there is a conveyance of land, voluntary on its face, made by a defendant in a suit, just before a judgment for a large sum is rendered against him, which judgment would be a lien on the land if such conveyance had not been made, and the evidence fails to show, by strong proof, that it was made *bona fide* and for a valuable consideration, a case is made for the application of the rule above stated, and the specific performance of an agreement for the purchase of the land will not be enforced.

Although the question of the sufficiency of the title often arises after the reference of title to a master has been made, yet the bill may be dismissed at the hearing, if the defect in title has been prominently put forward in the pleadings and proofs, and the court can then decide the question. *Fry on Spec. Perf. ch. xvii.* *253. This case, on the proof before us, looks like an attempt to impose a hard bargain and a suspicious title on an old man seventy-six years of age, and is not entitled to the favorable consideration of a court of equity on bill for specific performance.

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For these reasons, without considering other questions which have been raised, the bill should be dismissed and the decree reversed, with costs on appeal and in the court of chancery.

Decree unanimously reversed.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
appellant,

v.

THOMAS T. STURGES et al., respondents.

1. A sale under a decree in chancery may be set aside, even after deed delivered, by an order made in the original cause, either for impropriety in the sale, or for the purpose of letting in a defence to the action.

2. The making of such an order is a proper matter of appeal, either by the parties to the suit or by the purchaser.

3. A prior mortgage to "S. & Co., a firm composed of T. S. and J. S.," will be postponed to a subsequent one given to secure a loan made upon the strength of an agreement of J. S., surviving partner, and one of the executors of T. S., deceased, to the effect that the lender's lien should be preferred.

4. Acts done by one of several executors, which relate to the delivery, gift, sale or release of the testator's personalty, are deemed the acts of all, and bind the estate accordingly.

5. In equity pleadings, such degree of certainty should be adopted as will give the opposite party full information of the case he is called upon to meet.

6. At or after final hearing, it is too late to object to mere want of precision in the bill.

7. A bill alleging that a contract about a mortgage given to S. & Co., was made by that firm or their survivors and legal representatives, and setting who are the surviving partner and the legal representatives of the deceased and making them defendants, is not so vague as to justify the vacation decree based upon the contract, especially after the decree has been executed.

On appeal from a decree of the vice-chancellor, report

Mutual Life Ins. Co. v. Sturges, 5 Stew. Eq. 678.

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Mr. B. Gummere, for appellant.

The proceedings on the part of the complainant are in conformity to the statute and rules and practice of the court. *Carew Johnston*, 2 Sch. & Lef. 280; *Smith v. Kay*, 7 H. L. Cas. 750. Under these circumstances, the decree being not only enrolled, executed, the rule of practice is that the decree cannot be reversed except by a bill of review. 2 Dan. Ch. Pr. (4th ed.) 10, note 8; *Carpenter v. Mutchmore*, 2 McCart. 123.

The nominal ground of the application is surprise; but there is no pretence, even in the allegations of the petition, that there was a surprise practiced upon the defendants, within the legal meaning of the term.

But it is said that Henry C. Knubel, who, by force of the bankrupt act, is the assignee of the interest of James S. Sturges of the petitioner, Thomas S. Sturges, in the second mortgage, was not made a party to the suit, and had no notice or knowledge of it. *Lathrop v. Drake*, 30 Leg. Int. 141; *Cogdell Exum*, 10 B. R. 327; *Norton v. De Villeneuve*, 13 B. R. 304; *Bump's Bank*. 795.

Two distinct matters of alleged fraud appear on the face of the petition—

1. The first is charged with some distinctness, and it is, in effect, that Mr. Burnham had presented to the master, and had sworn before him to the receipt of a letter from one of Sturges & Co., which they had never seen, and that he had presented their mortgage to the master without any request from either of them, and without any authority, express or implied, and without their knowledge or consent.

2. The second is set up as an inference of constructive fraud, in that the contract of subordination of the Sturges & Co. mortgage was made after the death of Thomas T. Sturges, the elder, and after a moiety of said mortgage had vested in his executors and legatees. *Kerr on Fraud* (Bump's ed.) 374; *Bigelow on Estoppel* 485; *Stewart v. Lehigh Valley R. R. Co.*, 9 Vr. 505, 524.

Where one of two innocent parties must suffer, the one who, by his act or neglect, has enabled the fraud-doer to commit the fraud, is liable. *Kerr on Fraud* (Bump's ed.) 138, 139.

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The mortgage of Sturges & Co. was a chose in action, and the legal title thereto vested in James S. Sturges, the survivor of that firm. *Gow on Part.* 131, 348; *Story on Part.* § 346; *People v. Keyser*, 28 N. Y. 226, 235; *Holbrook v. Lackey*, 1 Metc. 132; *Shreve v. Joyce*, 7 Vr. 44, 48; *Murray v. Blatford*, 1 Wend. 583; *Bogert v. Hertell*, 4 Hill 492, 503; *Sturgesant v. Hall*, 2 Barb. Ch. 151, 160; 2 Wms. Errs. (6th Ed.) 1013, 1014; *Jones on Mortgages* § 796.

Mr. H. C. Pitney, for respondents.

The opinion of the court was delivered by

DIXON, J.

This appeal is taken from an order made upon the opinion of the vice-chancellor, that an interlocutory decree in foreclosure in all proceedings subsequent thereto, including the sheriff's sale, be set aside, so as to admit Henry C. Knubel, assignee in bankruptcy of James S. Sturges, as a defendant, and to permit him and the executors of Thomas T. Sturges, deceased, to plead answer or demur to the bill.

Before the filing of the petition, in accordance with which the order was made, conveyances of the property sold had been delivered by the sheriff to the purchasers, who were the complainants as to part, and a stranger to the suit as to the residue. Neither the petition nor the order takes any notice of the sale to the stranger, nor is he a party to the appeal. His claim, therefore, need not be considered here.

The fact that the sheriff's sale had been perfected by delivery of a deed, is not an insuperable bar to the vacation of the proceedings.

In support of this proposition, it is unnecessary to say more than is said by Chancellor Zabriskie, speaking for this court, in *National Bank of the Metropolis v. Sprague*, 6 C. E. Gr. 427, where, by citation of numerous cases in England, New York and New Jersey, he shows it to be the settled practice in courts

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of equity, that, for sufficient cause, sales under their decrees may be set aside by an order in the original suit, as well after as before confirmation and conveyance, and that the allowance or denial of such an order is a proper subject for appeal, either by the parties to the suit or by the purchaser.

Usually the ground upon which the court has proceeded to vacate a sale, has been some impropriety attending the sale; but this is not the only ground. In *Campbell v. Gardner*, 3 Stock. 423, Chancellor Williamson set aside a sale after deed delivered, because, under peculiar circumstances, the mortgagees had not been apprised of the pendency of the suit.

In the case first mentioned, Chancellor Zabriskie intimates that perhaps the opening of a sale and decree for the purpose of letting in a defence, is in the discretion of the chancellor so far that no appeal would lie. But this intimation has not been adopted by this court. The right of appeal depends upon whether the appellant is, in a legal sense, aggrieved (*Green v. Blackwell*, 5 Stew. Eq. 768); and that must be determined by considering, not upon what grounds the chancellor has proceeded, but what effect his action has upon the claims of the appellant. All the authorities concede that an order setting aside a sale for illegality attending it is appealable. The result to the purchaser is the same, if it be set aside, to let in a defence. His definite rights, under either his contract to buy or his conveyance, are finally destroyed in both cases. Such claims do not depend upon mere discretion, but must be protected or overthrown according to legal and equitable principles. Their owner is aggrieved by every order in chancery which substantially impairs them, and may seek redress for such grievance by appeal to this court.

In *Smith v. Alton*, 7 C. E. Gr. 572, an appeal was taken from an order of the chancellor, opening the decree to sell in a foreclosure suit, setting aside the sheriff's sale and admitting the mortgagees to make defence. The appeal was entertained and the order affirmed.

In *Cawley v. Leonard*, 1 Stew. Eq. 467, the appellants had petitioned for similar relief three years after sheriff's conveyances

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were executed, and the chancellor had refused the prayer. On appeal to this court, the relief asked for was given, on the ground of surprise and merits.

These precedents are controlling, both upon the power of the court of chancery to make the order complained of, and upon the right of the appellant to seek its reversal here.

This brings us to a consideration of the propriety of the order made below.

The reasons upon which it is based are, that the petitioners have merits which, without laches on their part, have not been presented, and that the allegations of the bill, upon which the chancellor assumed to pass upon those merits, are too vague to support the decree.

First, as to merits.

In 1857, the mortgaged premises were encumbered by a small mortgage held by Mrs. Lamson, and by a second mortgage for \$2,000, without interest, made to "Sturges & Co., a firm doing business in the city of New York, and composed of Thomas Sturges and James S. Sturges." The premises had been purchased by Thomas T. and James S. Sturges as a home for the half-brother, Joseph H. Sturges, and their mortgage was made and kept alive for the avowed object of preserving the property as his family residence. This is shown both by the letter of James to Mr. Burnham, the complainants' counsel, in January, 1869, and by the testimony, in these proceedings, of Thomas Sturges, jun., the son and executor of Thomas, deceased.

In 1869, the necessities of Joseph H. Sturges were such that he required \$1,000 to take up the Lamson mortgage, and meet other demands. On application by Mr. Burnham to Sturges & Co., it was arranged that the complainants should loan this \$1,000 and should have a first mortgage therefor; and accordingly the loan was made, the Lamson mortgage was paid off and canceled, the \$2,000 mortgage was canceled, a mortgage for \$1,000, dated January 1st, 1869, and recorded January 6th, 1869, was executed by Joseph to the complainants, and a mortgage for \$2,000, without interest, to Sturges & Co., dated February 24th, 1869, was executed by Joseph and recorded. This last mortgage was drawn by

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Burnham at a request by letter, signed "Sturges & Co.," and, in the description of the parties of the second part, was copied from the earlier \$2,000 mortgage. In fact, the firm of Sturges & Co. had been changed in 1864, by taking into it Thomas T. Sturges, jun. and Peter D. Sturges, the sons, respectively, of the older members, but the capital stock remained the property of the fathers only, and it is not claimed that the sons, as members of the firm, ever had any interest in the mortgage. This change was not known to Mr. Burnham.

In 1875, a further loan of \$2,500 was needed by Joseph, and the complainants were willing to grant it, provided a first mortgage for \$3,500 could be substituted for their \$1,000 mortgage. In order to make this arrangement, Mr. Burnham again called upon Sturges & Co., at their old place of business, and an interview was had, which Thomas T. Sturges, jun., describes as follows:

"He told me about some troubles that Joseph H. Sturges had, out here at Morris Plains, and that he would have to raise some more money on his place, as they were going to sell or do something with his place under judgment, or something like that; and if we would allow our mortgage to stand second, he could get the money from the Mutual Life Insurance Company; I told him I had no objections and was willing to do so, and he then said if I would write him a note or a letter to that effect, it would be sufficient; I wrote such a letter to Mr. Burnham."

The following is a copy of the letter :

"31 SOUTH ST., NEW YORK, May 20th, 1875.

"F. G. BURNHAM, Esq., Morristown, N. J.:

"Dear Sir—Your note of yesterday, in regard to mortgages on Mr. Joseph H. Sturges's farm at Morris Plains, N. J., came duly to hand and contents noted.

"In reply, I would beg to say that your proposition meets with approval, and all that can be said is, for you to go ahead and carry it out.

"As I understood it, the Mutual Life will then hold a first mortgage of \$3,500, and the old firm of Sturges & Co. will hold a second mortgage for the amount of their present one, with accrued interest to date of whenever the agreement is carried out.

"Hoping soon to hear from you that everything has been satisfactorily settled,

"I remain yours resp'ly,

"T. T. STURGES, JUN."

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The *approval* referred to in this letter, Thomas explains being the approval of himself and of James S. Sturges, with whom he consulted about the proposition.

In the meantime, the firm of Sturges & Co. had again changed by the withdrawal of Thomas T. Sturges in 1869 or 1870. Shortly afterwards, in 1870, he had died, leaving his widow and his son Thomas his executors, and his widow during her life, and his six children after her death, his legatees. His estate was large, and its management devolved almost wholly upon Thomas, the widow, as co-executrix, taking but little part therein.

These facts were not known to Mr. Burnham, save that he had received an indefinite impression of some change in the firm.

In accordance with the arrangement, the advance of \$2,500 was made by the complainants, a new mortgage for \$3,500, dated May 31st, 1875, was executed by Joseph to the complainant. The old \$1,000 mortgage was canceled, and a mortgage for \$2,000 dated May 21st 1875, in lieu of the other \$2,000 mortgage, was assigned by Joseph, but, because of Mr. Burnham's impression of some change in the firm, the name of the mortgagee was left blank until he should learn what was to be inserted. For this reason, the \$2,000 mortgage of 1869, which had always been in Mr. Burnham's possession, was not then canceled, and the matter, being temporarily laid aside, was then forgotten, and remained *in statu quo* until the complainants' bill for foreclosure was filed, about January, 1877.

The petitioners' merits depend upon whether, under these facts, their mortgage is entitled to priority over the complainants' lien for \$3,500. By the bill it is averred, and by the decree it is adjudged, to be subsequent to it.

Beyond all controversy, the complainants advanced the whole \$3,500 upon the understanding, arrived at in good faith and with reasonable diligence, that their lien therefor should be first. This gives them a strong claim in equity to insist upon such priority against any who do not stand upon a more equitable footing. As to \$1,000 of their debt, no one has any equity against them, because, for so much, their priority, both at law and equity, was undisputed, and if, by the cancellation of their \$1,000 mortgage,

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that priority at law was lost, through their honest mistake as to the completeness of the arrangement pursuant to which they canceled it, equity would relieve them from the consequences of that mistake against the petitioners, who have not changed their position because of it. It is clear, also, that the complainants' mortgage is entitled to priority for the whole sum, so far as the agreement of James S. Sturges, surviving creditor, and that of Thomas T. Sturges, jun., managing executor of the deceased creditor, can give it, for their consent to such precedence is admitted. Without inquiring into the effect which this agreement of the surviving creditor ought to have upon the interest of his deceased partner, it undoubtedly must defeat his own claim to priority, and hence that of his assignee, who derived his title from James some months after the complainants had loaned their money on the strength of James's agreement. The assignee, therefore, clearly has no merits.

With equal conclusiveness, the contract of Thomas T. Sturges, jun., the managing executor of his father's estate, disposes of the claims of that estate, unless fraud is fastened upon the complainants. For it is well settled that acts done by one of several executors, which relate to the delivery, gift, sale or release of the testator's personalty, are deemed the acts of all, and bind the estate accordingly. *Coote on Mortgages* 511; *2 Wms. Exrs.* *947; *Ex parte Rigby*, 19 Ves. 463; *Wheeler's Exrs. v. Wheeler*, 9 Cow. 34; *Shreve v. Joyce*, 7 Vr. 44.

Here, the testator's widow left the active administration of the estate to her co-executor, as she had a clear legal right to do (*Schenck v. Schenck*, 1 C. E. Gr. 174), and when he consented to postpone the lien of the testator's mortgage, and the complainants thereupon advanced their money, that consent was as obligatory as if both executors had signed it. *Stuyvesant v. Hall*, 2 Barb. Ch. 151.

Indeed, the avowed purpose for which the mortgage was held, the strait in which the mortgagor stood, and the fact that the surviving obligee and the managing executor so readily agreed to give the complainants priority, make it highly probable that if the executrix did not consent, it was merely because she was

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not asked. Thomas, her son, who was living with her at ~~t~~ **h**e time, says he believes he did not consult her.

Is there, then, any ground for charging fraud upon the ~~com~~ **pl**ainants?

The only fraudulent design which it is possible to suggest ~~is~~ **as** a purpose to deprive the beneficiaries under the will of Thom ~~as~~ **of** T. Sturges, deceased, of their equitable rights in the priority ~~of~~ **ve** the \$2,000 mortgage. Mr. Burnham was the sole representati ~~on~~ **a** of the complainants in the transaction. If, therefore, such ~~purpose~~ **e-** purpose is to be attributed to the complainants, it must 'be b ~~ecause~~ **t,** cause he entertained it. The first step towards making it ou ~~ts~~ **-** and a *sine qua non*, is to show that he had knowledge of the ex ~~istence~~ **r-** istence of such beneficiaries. But of this fact there is not a pa ~~rticle~~ **he** of proof. To the contrary, he, on his oath, declares that ~~he~~ **as** had not the slightest notice or information that the mortgage w ~~as~~ **er** held by any other parties than Sturges & Co., and that he nev ~~er~~ **he** heard of the death of Thomas T. Sturges until long after t ~~he~~ **ll.** money had been advanced, and just before the filing of the bi ~~ll~~ **P**. The oath of this gentleman is entitled to stand against much o ~~pposing~~ **w** posing evidence; uncontradicted, as it is here, it leaves no shad ~~ow~~ **On** of doubt. The members of this court are unanimously of opini ~~on~~ **as,** that his integrity is not to be questioned. The executor Thom ~~as~~ **t** also, speaking of his own conduct, says, I believe truly, "wha ~~t~~ **t** I did, I did in all good faith, supposing it was perfectly right ~~t~~ **that** I see no reason to doubt the honesty of any of the parties in t ~~hat~~ **transaction.**

We are therefore quite agreed that by the case made on ~~th~~ **is** petition, these petitioners have no merits. This renders it ~~un-~~ **un-** necessary to discuss the topic of surprise without laches; but ~~our~~ **our** conclusion upon that point is also against the petitioners.

Finally, it was adjudged below that the averments in the ~~bi~~ **ll,** relied on as setting out the complainants' right to preference, ~~are~~ **are** so vague and uncertain that when confessed by the defendan ~~t's~~ **t's** default and proved before the master, they did not warrant ~~the~~ **the** decree of priority.

The same precision of statement that is required in pleadi ~~ngs~~ **ings** at law has never been attained in bills in equity, but such deg ~~ree~~ **ree**

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Certainty should be adopted as may give the defendant full information of the case he is called upon to answer. *1 Dan. Pr. 373; Houghton v. Reynolds, 2 Hare 264, and note.*

The bill alleges that the contract to subordinate the mortgage Sturges & Co. to the complainant, was made by that firm, or their survivors and legal representatives, and then avers that survivor of the firm was James S. Sturges, and that the legal representatives of the deceased partner were his executors, Susan Thomas T. Sturges, jun., and these persons only are made defendants on behalf of said firm. These statements fairly amount to an assertion that the contract was made by the firm, by James and the executors of Thomas. The only uncertainty about it is, that it does not specify which of the two contracted. Such alternative averments are not admissible by the strict rules of common law pleading, but reference to any book on equity forms will show that there they are not infrequent. In actions at law against the survivors of a firm, or against executors, the declaration would state the several possible promises in separate counts, but, upon the whole pleading, the defendant would be apprised of the ground of suit with no more accuracy than this bill affords. I think, even on demurrer, a court would hesitate to adjudge this complaint bad for uncertainty.

But where, as here, after regular proceedings against the defendants, the party has been put to his proofs, and a final decree in his favor has been made and executed, it is unprecedented to permit such an objection to prevail. Objections to pleadings which involve no substantial interests are not allowed even upon a hearing. *Freeman v. Scofield, 1 C. E. Gr. 28.*

And it is then too late to complain of mere want of precision in the bill. *Smith v. Kay, 7 H. L. Cas. 750.*

The order appealed from should be reversed, with costs.

Decree unanimously reversed.

 Putnam v. Clark.

ADAH A. PUTNAM et al., appellants,

v.

LYDIA A. CLARK et al., respondents.

1. A party who files a bill alleging that a paper made by him has been altered since its execution, and asking to have it canceled, must prove the fact of subsequent alteration.

2. Such a party does not occupy the same position as if he were resisting a claim founded upon such altered instrument, and he cannot successfully ground his right to a cancellation of it upon a technical presumption of a falsification arising from a suspicious circumstance merely.

On appeal from a decree of the chancellor, reported in *Putnam v. Clark*, 2 Stew. Eq. 412.

Mr. Peter Bentley and Mr. Cortlandt Parker, for appellant.

I.

(a) Suspicious circumstances being shown to be connected with the alteration, it is necessary for the party relying on the instrument to explain satisfactorily the alteration.

(b) The circumstances of this case make the alteration appear not only suspicious, but also probably fraudulent.

(c) There has been no explanation of the alteration by the party relying on the instrument. The decree, therefore, should be reversed. *Hunt v. Gray*, 6 Vr. 227; 1 Whart. Ev. § 629; *Baile v. Taylor*, 11 Conn. 531; *Beaman v. Russell*, 20 Vt. 205, 21 1 Greenl. Ev. § 564; *Matthews v. Coulter*, 9 Mo. 896; *Ram v. McCue*, 21 Gratt. 349; *Wilde v. Armsby*, 6 Cush. 314; *Rubin v. Blackwell*, 2 Johns. Cas. 198; *Tillou v. Clinton and Essex Ins. Co.*, 7 Barb. 564; *Harker v. Gustin*, 7 Hal. 45.

II.

From the proofs before the court, it will be presumed that the original assignment is in the defendants' possession, and that

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is concealed by them. The most unfavorable inference is to be drawn against them. 1 *Greenl. Ev.* § 559; 2 *Dan. Ch. Pr.* 1817; 1 *Whart. Ev.* § 147; *Greenl. Ev.*, § 558; *McGuire v. Mobile*, 42 *Ala.* 589; *Holbrook v. Trustees*, 28 *Ill.* 187; *Chicago & N. W. R. R. Co. v. Ingersoll*, 65 *Ill.* 399; *Preslar v. Stallworth*, 37 *Ala.* 402; *Mason v. Tallman*, 34 *Me.* 472; 2 *Whart. Ev.* § 1267.

III.

When the mortgage to which this mortgage had been assigned as collateral by Barrett was paid, Barrett became entitled to this mortgage, and he has never lost that right; he was at best but a trustee for the complainant, and she is entitled to all he was entitled to. *Paulin v. Kaighn*, 5 *Dutch.* 480.

IV.

The defendant Clark's executors are not entitled to relief under their cross-bill, i. e., to have the complainant pay the municipal charges which were upon the property at the time the premises were purchased by Hosea F. Clark. *Shinn v. Budd*, 1 *McCart.* 234; *Garwood v. Eldridge*, 1 *Gr. Ch.* 150.

Mr. Hamilton Wallis, for respondent

I. Redfield was a purchaser of the bond and mortgage for value and without notice, or was, at all events, subrogated to the rights of the insurance company.

II. Appellant cannot prevail without proving the assignment to Barrett to be a forgery, and there is no such proof. *Kerns v. Swope*, 2 *Watts* 75; *Harker v. Gustin*, 7 *Hal.* 45.

III. If not a forgery, the only ground remaining to appellant is that the respondents Redfield and Clark are bound by the equity existing between the appellant and Barrett.

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Messrs. Collins & Corbin, for defendants.

I. Hosea F. Clark was a *bona fide* purchaser for value without notice, of the bond and mortgage, and equity will protect him and his representatives. *Portarlington v. Soulby*, 6 Sim. 356, 7 Id. 28; *Dawson v. Prince*, 2 De G. & J. 41; *Pierce v. Faur*, 47 Me. 507; 2 Lead. Cas. in Eq. 57, and cases cited; *Liv*, 9; *ston v. Dean*, 2 Johns. Ch. 479; *Wilson v. Hill*, 2 Beas. 13; *Morton v. Rose*, 2 Wash. C. C. 233; *Woodruff v. Depue*, 1 McCart. 168; *Losey v. Simpson*, 3 Stock. 246; *Danbury v. Rob*, 1 McCart. 213; *Bloomer v. Henderson*, 8 Mich. 395; *P*, 4; *v. Blackwell*, 4 Jones Eq. 58; *Starr v. Haskin*, 11 C. E. G. 41; *Mott v. Clark*, 9 Barr 399; *Van Hook v. Somerville*, 1 Hal. Ch. 633; *Vredenburg v. Burnet*, 4 Stew. Eq. 229; *Kern*, 1; *Swope*, 2; *Watts* 75; *Harker v. Gusten*, 7 Halst. 45; *Jones Smith*, 1 Hare 43.

II. The Clark defendants have good presumptive title to the bond and mortgage, and the complainant has not overcome it. *Stew. Dig.* 770 § 150; *Cumberland Bank v. Hall*, 1 Hal. 25; *N. R. Meadow Co. v. Shrewsbury Church*, 2 Zab. 427.

III. The complainant's suit cannot prevail, because of her gross negligence. *Westervelt v. Scott*, 3 Stock. 80; *Van Hook v. Somerville*, 1 Hal. Ch. 633; *Peabody v. Fenton*, 3 Barb. Ch. 451; *Trenton Banking Co. v. Woodruff*, 1 Gr. Ch. 117; *Hoff. Ch. Pr.* 306.

IV. Where there are equal equities possession must prevail. *Archer v. Bank of England*, Doug. 637, 639; *Wells v. Archer*, 10 S. & R. 412; *Ellis v. Kreutzinger*, 27 Mo. 311.

V. The defendants must not suffer because the original assignment, which is said to have been altered, is missing. *Hoffman's Ch. Prac.* 306.

VI. As to the cross-bill. *Shinn v. Budd*, 1 McCart. 234; *Garwood v. Eldridge*, 1 Gr. Ch. 145; *Young v. Hill*, 4 Stew. Eq. 429.

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The opinion of the court was delivered by

REED, J.

The bill in this suit is filed by Adah A. Putnam and her husband, to secure the cancellation of a certain assignment of a bond and mortgage, which assignment purports to have been made by the complainants to one William C. Barrett.

It appears that in April, 1871, Lydia A. Putnam was the owner of a bond and mortgage for \$12,000, made to her by one Jane M. Mackey. She was anxious to raise money by means of a sale of this security. Her attorney for many years had been William C. Barrett, of New York city. She communicated her wish to him, and he undertook to negotiate the sale of this mortgage. She says, in her bill, that he represented to her that he had a client, whose name was William C. Ramsey, who was making investments, and who would take this mortgage. It appears that she and her husband executed an assignment of this mortgage, acknowledged by herself and husband, and that the assignment was left in the hands of Mr. Barrett. The bill states that, subsequently, Barrett informed the complainants that Ramsey had not the money, and that he, Barrett, had not been able to procure it. The assignment remained in Barrett's possession, he paying the interest upon the said mortgage to Mrs. Putnam.

In March, 1875, Barrett assigned this mortgage, as collateral security, to the Relief Fire Insurance Company of New York. They re-assigned it to one Redfield, and he to the respondent, Lydia A. Clark.

The complainants became aware of the assignment by Barrett to the Relief Fire Insurance Company, after Barrett had absconded, and the complainants had sought in vain for their mortgage among his papers.

Their contention in this suit is, that Barrett had no title in the mortgage which he assigned to the fire insurance company; that the assignment which they executed at the time Barrett was to raise money by the sale of the mortgage was made to William C. Ramsey, the person from whom the money was expected; that the name William C. Ramsey was subsequently fraudulently changed to

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William C. Barrett, and that respondent's title to this mortgage rests upon this forged assignment.

The prayer of the bill is, that the mortgage now in the possession of the respondents be delivered to complainants, and the assignment by Barrett be canceled.

It thus appears that the question which now presses for solution is whether the complainants have shown an alteration in the assignment which avoids it.

The original assignment has not been produced, and the efforts of the complainants to discover it have been unsuccessful. Does it appear that the assignment ever came to the hands of Mrs. Clark. The record of the assignment has been offered. The record shows an assignment acknowledged before Mr. Nettleton, a commissioner of New York, and witnessed by him. Underneath his name, and affixed to the attestation clause, are the words, "The words 'C. Barrett, New York,' written over an erasure."

Mr. Nettleton was sworn, and says that he has no recollection of this particular assignment. He says that when he has occasion to note an alteration, his habit is to make the notation over and not under his signature. He further says that when he desires to make such a notation, after he has signed his name, he makes it over his name, and if there is not space, he erases his name, makes the notation, and re-writes his signature under it. He admits that he has sometimes forgotten to write his name as a witness. The other witness, Mr. Putnam, has no recollection at all of making the assignment. There is no evidence offered on the part of the respondents relative to the execution of the assignment.

The contention of the counsel of appellants is, that there is, in connection with the proof of alteration, such suspicious features as throw upon the respondents the burden of showing that the alteration was made before or at the time of execution; that the respondents, having failed to prove the time and manner of the alteration, therefore the cancellation of the instrument should be decreed.

The question as to the burden of proof in cases involving the

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ity of altered papers, usually arises where the actor grounds right of action upon the altered instrument. In this class of cases, by a rule long settled in this state, no presumption arises to validate an instrument because, from inspection, an alteration appears to have been made. *Cumberland Bank v. Hall*, 1 Hal. 100.

North River Meadow Co. v. Shrewsbury Church, 2 Zab. 100.

Hunt v. Gray, 6 Vr. 227.

It while this is true, it is probably equally true that the appearance of the alteration itself, or slight circumstances connected with, may exhibit *indicia* of unfairness, which, while falling short of proof thereof, would throw upon the propounder of the instrument the burden of showing that the alteration was fairly made, and that a failure upon his part to make such proof would warrant a finding against the validity of the instrument. Cases cited in 2 *Greenl. on Ev.* § 564, note.

Were this a cause in which the respondents were asserting a right based upon this assignment, the question would arise whether such indications of unfairness exist. Such a cause would be presented by a foreclosure suit instituted by the respondents to foreclose the mortgage assigned. A similar cause would appear if the complainants, ignoring the alleged assignment, should file a bill to foreclose the same mortgage, and the respondents should come in and assert their right to the same, by virtue of this assignment.

The present suit is not of this character. It is an attack upon the validity of a paper which it brings into court, and the avoidance of which it asks, upon the ground that it is a forged instrument.

The gravamen of the bill is that it was fraudulently altered. The complainants do not stand here defending against a person who produces an assignment and thereby asserts its genuineness, but they occupy the position of parties who themselves produce the instrument and assert its falsity. They must prove that it is false. They cannot rest their case upon a technical presumption arising from circumstances of suspicion. They must prove it by showing affirmatively a collocation of circumstances which

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impress the mind with a conviction that the instrument fraudulently altered. This the complainants have failed to do and the decree of the chancellor should be affirmed.

Decree unanimously affirmed.

JOHN R. VAN HOUTEN, executor &c., appellant,

v.

GEORGE POST, respondent.

1. Where a parent bequeaths a legacy to a child it is understood to be a portion, and if, after the execution of the will, the parent gives a sum of money to the child equal in amount to the legacy, if it be *ejusdem generis*, it will be an ademption of the legacy, if so intended.

2. The advancement of a less sum, with intent to go on the legacy, will be an ademption *pro tanto*.

3. Evidence of parol declarations of testator of the fact of giving the money is not admissible, but such fact must be proved by other testimony.

4. Charges in books, made by parent against child, to show advancements, admitted in evidence; such testimony having been so long received by the courts of this state.

5. The fact of the money having passed from the parent to the child being proved, it will be presumed to be in satisfaction of the legacy; but the presumption will be slight, and evidence of parol declarations of testator that he did not so intend (and also his declarations in reply thereto that he did so intend) are admissible.

6. Whether intended to be a gift, independent of the legacy, or the payment of a debt, or a portion in ademption of the legacy, is to be decided by the circumstances and facts proved in each case.

On appeal from a decree of the ordinary, reported in *Van Houten v. Post*, 5 *Stew. Eq.* 709.

Mr. J. Hopper and Mr. J. D. Bedle, for appellant.

Mr. T. D. Horsey, for respondent.

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The opinion of the court was delivered by

PARKER, J.

Rachael Van Houten executed her last will on the 20th day of October, A. D. 1857, and died in the year 1863.

The executors named in her will were her son-in-law John R. Van Houten, and her son George Post, the litigants in this suit.

On April 27th, 1866, an account was filed for settlement in the orphans court of the county of Passaic. It purports to be the account of both executors, but was filed and sworn to only by John R. Van Houten. George Post, the other executor, filed exceptions to the account. Van Houten prayed allowance for the sum of \$5,000, paid by him to his wife Catharine Van Houten for a legacy of that amount bequeathed to her by the will of her mother.

To this claim for allowance by Van Houten, Post, who is interested in the residue, excepted, on the ground that after the execution of the will the testatrix advanced the amount of said legacy to her daughter Catharine with the intention of satisfying the same, and that thus the legacy was adeemed. The orphans court sustained this view and refused to allow Van Houten the credit he claimed. From the decree of the orphans court, Van Houten appealed to the prerogative court, and the ordinary affirmed the same, and ordered Van Houten to pay the costs of appeal out of his own funds. From the decree made by the ordinary Van Houten appealed to this court.

The question to be decided is, whether the \$5,000 legacy bequeathed to Catharine by the will of her mother was adeemed. This bequest is at the close of the eleventh item of the will, and is ordered to be paid out of the proceeds of certain land which the executors were ordered to sell.

Where a parent bequeaths a legacy to a child, it is understood to be a portion, and if, after the execution of the will, the parent gives a sum of money to the child equal in amount to the legacy, if it be *ejusdem generis*, it will be an ademption of the legacy, if intended. 2 Story's Eq. Jur. § 1111 et seq., and notes

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thereto; 2 Wms. Exrs. (ed. 1877) 1439; 2 Redf. on Wills 537, and notes.

And if the advancement of a less sum, with intent to go on the legacy, be proved, it will be an ademption *pro tanto*. 2 Redf. on Wills 538.

To prove the ademption of a legacy it must appear, first, that the legatee received the money from the testator after the execution of the will; and secondly, that such money was advanced as a portion, with the intention of satisfying the legacy.

There is some contradiction in the authorities as to the admissibility of the parol declarations of the testator, after the execution of the will, upon the fact of the passing over of money to the child, and also as to the intent, especially where such declarations are not made contemporaneously with the act. After careful examination of the cases, the following are deduced and stated as rules upon this much-vexed question. To prove the mere fact of the passing over of the money from the parent to the child, evidence of the parol declarations of the testator is not admissible, but such independent fact must be proved by other testimony. *Faukner v. Watts*, 1 Atk. 407; *Batton v. Allen*, 1 Hal. Ch. 99; 2 Wms. Exrs. 1444.

To admit evidence of such declarations would be to revoke the provisions of a will by parol. There is no reason for such a departure from principle. Should a parent make an advancement to satisfy a legacy to a child, and there be no evidence of the fact of giving the money to the legatee, he can easily manifest his intention by executing a codicil.

Charges in books made by parent against child have been so long admitted in the courts of this state, as tending to show advancements, that the rule in reference to these cannot now be well changed, but such evidence as to the fact of passing over the money is of a low grade.

The fact of the money having passed from the parent to the child, after the execution of the will, being proved, the next question is as to the admissibility of evidence to show the intention.

Was it a gift independent of the provisions of the will, or a

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or payment of an obligation ; or was it intended as a portion in satisfaction of the legacy ?

The current of authority holds that it will be presumed to be in satisfaction of the legacy, but that this presumption is slight, and to overcome it evidence of parol declarations of the testator is admissible to show that he did not intend the money as a portion in satisfaction of the legacy, and, in reply thereto, his parol declarations that he did intend, may be shown, to ascertain if the presumption be well or ill founded. *Rosewell v. Bennet*, 3 Atk. 77 ; *Kirk v. Brown*, 3 Hare 509.

The presumption arising from the passing of the money from a parent to the child is so slight and so easily overcome, that the rule may be stated to be that whether the money was intended as a gift independent of the legacy, or the payment of a debt, or a portion in ademption of the legacy, must be decided by the circumstances and facts proved in each case.

Declarations of a testator as to the object, when admitted in evidence, to overcome or sustain the presumption, in order to adeem the legacy, should not be vague and uncertain, but should be stated with some particularity, so that they could be understood by the persons who heard them. Otherwise they should be entitled to little weight.

Declarations of the intention, to avail as evidence, should be made by a testator who, at the time of making them, was in the possession of his mental faculties. If the evidence in the case under consideration proves that, at the time of making the alleged declarations as to intention, Rachael Van Houten, the testatrix, was insane, and not in condition of mind to make such declarations, if admissible, should be disregarded in determining the question whether a provision in so solemn an instrument as a last will should be thereby rendered nugatory.

Four or two years before the death of Rachael Van Houten she was insane. For some time previous thereto she was, as the witnesses say, out of her mind much of the time. In the early part of a conversation she would appear to be sane, but if the interview was prolonged she would become excited and furious. Especially would this be the case if the conversation related to

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her property or her will. At such times, the witnesses say, had not mind enough to make a will. For the last two years of her life she did not have lucid intervals.

The declarations admitted by the orphans court were made by the testatrix about the time of the interview spoken of by Aaron Pennington in his testimony, or subsequent thereto, and to ascertain her state of mind then, it will be necessary to refer to the evidence.

Mr. Pennington says that the testatrix made certain declarations to him, on the 26th day of October, 1859, as to the effect of the giving of money which the exceptant claims was advanced by her to her daughter. He swears that he drew the will and superintended its execution in 1857, and that before he called on her, upon the occasion he speaks of, she had lost her mind in some measure, but when her partial derangement commenced he cannot say. He further says that he went to see her a number of times, to ascertain if she was in a condition to make an alteration in her will about Adrian Post, in relation to his share, and that on those occasions she would get flurried and unable to make a will as he thought; that the last time he saw her she was very much out of her mind, and told him she was afraid he would do her bodily harm. He further says that on the 26th day of October, 1859, the day she made the declarations to which he testifies, he would not have allowed her to cancel that will under any circumstances, and that he doubted if on that day she had the capacity to make a new will. Some of the other witnesses speak of her declarations about the time of the interview with Aaron Pennington, or subsequent thereto; but in view of his evidence as to her state of mind, it is not necessary to examine their testimony. Whatever she said under those circumstances (if true in evidence) should have no influence in the determination of the cause.

Leaving out of view all evidence of the declarations of the testatrix, for the reasons already stated, it remains to consider the other testimony offered by the exceptant, for the purpose of proving that Catharine received the money from testatrix.

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the execution of her will, and the object for which it was received by her.

It is said that, in some casual conversations, Catharine admitted that she had received from her mother \$5,000, in satisfaction of the legacy. Declarations of a legatee, both as to the fact of the receipt of money and the object for which it was received, are important, and proof of this character should be examined with much care. The only testimony produced by exceptant on this branch of the case worthy of consideration, is that of Aaron S. Pennington. Upon the evidence of this witness the decision of the prerogative court is mainly based.

Mr. Pennington was a gentleman of high character, and would not intentionally make any statement he did not believe to be true; but from all the admitted facts in the cause, and from other parts of Mr. Pennington's testimony, it is evident that he was mistaken in his statement of what Catharine said to him about the advancement of the money.

It must be observed that the examination of Mr. Pennington as a witness, took place nearly nine years after this alleged conversation with Catharine. Mr. Pennington says, in substance, that about two years after the will was executed, he visited the testatrix, having the will with him, and that his recollection is that, as he came down stairs from the room of testatrix, he saw Catharine for a few moments, and told her that her mother said that the \$5,000 (referring to the legacy) had been paid her in the house, and that she replied, "That is right." He adds that his impression of what Catharine said depends entirely upon his recollection. Mr. Pennington further says that, when he went to his office, he endorsed what the testatrix had said on the envelope in which the will was enclosed, and he thought he had also endorsed what "Caty" said, but found, when he came to give his testimony, he had not done so.

If Catharine did say what, after the lapse of so many years, Mr. Pennington thinks she said, is it not strange that he did not endorse her reply to him on the envelope at the time he endorsed the declaration of the testatrix? His object must have been to preserve evidence, and, as a lawyer, he must have known that

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the admissions of Catharine were of far more importance than the declarations of testatrix, especially when the testatrix, as the witness says, had lost her mind to such an extent as not to be able to make a will upon that day.

If the memory of the witness failed him as to his supposed endorsement of what "Caty" said upon the envelope, did it not also fail him as to what "Caty" did actually say? One is in reference to a supposed fact, and the other relates to a hurried conversation, which is much more difficult to retain.

The strongest evidence of inconsistency in the testimony of Mr. Pennington, showing conclusively great infirmity of memory, is the fact that on the 1st day of February, 1865, he wrote a receipt for Catharine Van Houten to sign, acknowledging the receipt from the executor of Rachel Van Houten of \$5,000 for the very legacy in question.

Upon this instrument, signed by his wife, John R. Van Houten paid the money which in his account he asked the orphans court to allow him.

Mr. Pennington was not the adviser of the Van Houtens alone, but was the counsel and confidential friend of the whole family of the testatrix. If Catharine had told him the legacy had been paid her, by advancement of money by her mother after making the will, would he have allowed the executor to pay her again? An honorable and just man, such as all admit Aaron S. Pennington was, would not have suffered Catharine to receive a double portion.

But it is said that, at the time he wrote the receipt, Mr. Pennington had forgotten that Catharine had told him she had received the amount of the legacy from her mother. This is an acknowledgment of his loss of memory. The writing of the receipt was about three years previous to the examination of Mr. Pennington as a witness, and if he had any memory of the conversation with Catharine, it would certainly then have been more accurate than at the subsequent period of his examination.

The circumstances attending the writing of that receipt were calculated to call attention to what Catharine had said about the legacy, if she ever did say what the witness thinks she did.

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knew that, by the will which he had drawn and kept in his possession until the death of the testatrix, Catharine's legacy of \$5,000 was to be paid to her out of the proceeds of sale of certain land by the executors, which sale he was to approve. He did approve the sale and prepare a deed for the property, and also wrote a receipt for commissions, to be signed by the person who effected the sale; and on the same day he wrote the receipt for the legacy for Catharine to sign. There should not have been any confusion in his mind, for there was no other \$5,000 legacy bequeathed to Catharine.

Is not the fact that Mr. Pennington wrote the receipt for the legatee to sign so inconsistent with his testimony as to what she had said to him about the legacy, as to conclusively demonstrate that his memory cannot be relied upon? If the conversation with Catharine had, for the moment while writing the receipt, escaped his memory, would it not have occurred to him in time to have the money refunded to the executor? Although he must have seen the executor and legatee almost every day, there was no mention of the conversation with Catharine until some three years afterward, when he was examined as a witness.

To justify Mr. Pennington in writing the receipt upon which Catharine was paid her legacy by the executor, it is not sufficient to say that he did not wish to take part in any dispute about the matter, nor be counsel for either party.

There is no evidence that at the time the receipt was drawn there was any controversy about the legacy, nor did the difficulty concerning its payment arise until Mr. Van Houten presented his account for settlement. It was Mr. Pennington's duty to take part, if he had knowledge of a fact or declaration of the legatee which, if proved, would adeem the legacy. It cannot be supposed that so just a man as Aaron S. Pennington was known to be, would have remained silent and suffered Catharine to be paid \$5,000 which he knew she had acknowledged she had already received. Much less would he aid such payment by drawing a receipt for the money, for her to sign.

There is evidence that when John R. Van Houten desired to have his executor's account prepared for settlement with the

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orphans court, he took the papers, including the \$5,000 receipt to Mr. Pennington for that purpose, and that the account claiming allowance for payment of the legacy to Catharine was prepared in his office.

From the foregoing, it is evident that Mr. Pennington has entirely forgotten what Catharine had said on the occasion spoken of by him, and he says he never spoke to her again on the subject.

If the testimony closed here, it is clear that there is not sufficient proof to justify the court in holding that the legacy was adeemed. But there is evidence on the part of the appellants. Catharine Van Houten denies positively that she ever told Mr. Pennington what he says he thinks she did, or that she ever told any one that her mother had given her any money in satisfaction of the legacy. Both Mr. and Mrs. Van Houten swear that (Catharine) never had the \$5,000, nor any part thereof, in payment on the legacy. They say that prior to the construction of the house referred to in the evidence, or about that time, the testatrix, while yet sane, made her daughter presents of a few small sums, amounting in all to about \$300, to aid in the building undertaken at the testatrix's request, and, in fact, in part for her accommodation, and toward which she had promised to contribute.

This version of the transaction is sustained by the evidence of Adrian Post, a favorite grandchild, who resided with her, and knew more about her motives while she was in possession of her mental faculties than any other witness. He says his grandmother never told him she had furnished a cent toward the house, but said she would help along a little towards it, for the house she lived in was not large enough for her own family.

Mr. Van Houten says in his testimony that he built the house with his own money, except about \$800, which he received from his wife, \$300 of which he says her mother presented to her at different times. He states how he obtained the money to build the house, and produces a copy of records of deeds of lands sold by him prior to the commencement of the work, showing consideration-money expressed as received, greater in amount than

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the cost of the house. There is also evidence to show that at **that** time John R. Van Houten was abundantly able to pay for **such** a house from his own funds.

If Catharine received \$5,000 from her mother during her life, **and** after the execution of the will, in what sums was it handed to her? Was all given her at once, or at different times, and if **so**, how much at a time? To answer these important questions **no** evidence is produced. Is it not strange that if so large a sum as \$5,000 was given by the testatrix to her daughter, no one saw it **done**? It must be remembered that even before she became **insane**, the testatrix was not capable of transacting such business **without** assistance.

Mr. Pennington or **Mr.** Van Houten had attended to her **financial** affairs for several years before she lost her mind. The **money** could not well have been disbursed by her to Catharine **without** the knowledge of one or both of them. Both were **wit-**
nesses in this cause, but neither testifies that he ever saw any **money** pass from the testatrix to her daughter.

Again, where did the testatrix get the money to give to her daughter? There is nothing to show the receipt by testatrix of any considerable sum of money at the time of the building of the house, or within a reasonable time previous thereto. Several years before that event she had received \$1,700 or \$2,400 for a mortgage, but as her money when it came in was re-invested either by **Mr.** Van Houten or **Mr.** Pennington, it is not, in the absence of evidence, to be presumed that the testatrix had that money by her at the time of the building of the house. If not given to George Post, of which there is some evidence, or used in support of the family she had around her, some of whom were continually clamoring for money, it was doubtless re-invested.

Could the testatrix, in her condition and with her surroundings, have received a sum so large as to satisfy the legacy in question, without some evidence of the fact? Does not the testimony prove that for several years before her actual insanity, she was not able to transact such business alone? When, from whom and in what sums did she receive the money? Did she give any receipt or writing of acknowledgment, or cancel any

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mortgage of large amount? Or is there any parol testimony the particulars of any such transaction? No such evidence produced. The testimony in the cause does not sustain the allegation that the legacy was adeemed.

The claim of the appellant for the payment of \$5,000 to wife for her legacy should have been allowed him in his account before the orphans court. The decree of the ordinary affirming the decree of the orphans court is reversed.

The appellant also appeals from that part of the decree of the prerogative court which directs the costs of the appeal to be paid out of his own funds. This part of the decree should be reversed. While it is true that the mass of the testimony has no relevancy to the issue in the cause, and while the effort appears to have been made to reveal the family history from its beginning in its most hideous and repulsive form, rather than to elucidate the question before the court, yet it cannot be perceived that either party was less eager to prolong such a disgraceful contest than the other, and as the litigants seem to have equally enjoyed the character of litigation for more than thirteen years, each party should pay his own costs in the appeal before the prerogative court, and also in this court, out of his own funds.

Decree unanimously reversed

ELISHA RUCKMAN, appellant,

v.

MARGARET RUCKMAN, respondent.

1. A bond and mortgage belonging to a husband were assigned by him to one S., and by S. immediately re-assigned to the wife; both assignments duly acknowledged, and that to S. recorded, by the husband's direction the bond and mortgage and both assignments remained in the husband's possession, except once afterwards when the mortgage was delivered to the wife for a temporary purpose and then returned by her to her husband. There was no consideration for the transfer—*Held*, that as there was no delivery of the bond and mortgage and assignment to the wife, the title thereto never passed to or vested in her.

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2. Costs of printing a volume of three hundred pages of testimony, nine-eighths of which consisted of matters entirely irrelevant to the issue, not allowed to either party as against the other.

On appeal from a decree of the vice-chancellor, reported in *Ruckman v. Ruckman*, 5 Stew. Eq. 259.

Mr. John W. Taylor, for appellant.

Upon the evidence there arises the question of law, *whether there was a sufficient delivery to make the assignments effectual, and vest the title to the mortgage in Mrs. Ruckman.* Com. Dig., Fuit A 3, A 4; Coke Lit. 36 a; Shep. Touch. 58; 3 Wash. R. P., (4th Ed.) 578; *Folly v. Vantuyl*, 4 Hal. 153; *Cannon v. Cannon*, 11 C. E. Gr. 316; *Church v. Muir*, 4 Vr. 319; *Bump on Fraud. Conv.*, (2d Ed.) 447.

Mr. R. Allen, jun., for appellant, cited—

Ward v. Andlum, 8 Beav. 201; *Silmon v. Wilson*, 3 Edw. 36; *Scorille v. Post*, 3 Edw. 203; *Wheeler v. Kirtland*, 8 C. E. Gr. 13; *Skillman v. Skillman*, 2 Beas. 403; *Jackson v. Malsdorf*, 11 Johns. 107; *Finch v. Finch*, 15 Vesey 44; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Gascoigne v. Throing*, 2 Vern. 366; *Garfield v. Hartmaker*, 15 N. Y. 475, 10 Paige 567; *Dills v. Stevenson*, 2 C. E. Gr. 413; 3 Johns. Ch. 383, 521; 3 Ves. 361; 1 Jacobs 126; *Fulton v. Fulton*, 48 Barb. 583; *Shirttuff v. Francis*, 118 Mass. 154; *Noble v. Smith*, 2 Johns. 53-56; *Smith v. Smith*, 2 Strange 940, 956; *Delmolte v. Taylor*, 5 Bradf. 417; *Tait v. Helbert*, 2 Ves. 112.

Mr. Jacob Weart and Mr. I. W. Scudder, for respondent.

A gift can be made in two ways—by parol, or by deed in writing. The donee must be put in possession of the property actually or constructively.

Possession is given in two ways—of goods and chattels by actual or constructive delivery.

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Of choses in action by an assignment in writing, or by a par-
assignment and actual delivery. *Betts v. Francis*, 1 Vr. 152;
Dilts v. Stevenson, 2 C. E. Gr. 407; 2 Kent's Comm. 439.

A bond and mortgage is a chose in action, and may be assigned in equity by a mere delivery. *Galway v. Fullerton*, 2 E. Gr. 389; *Bower v. Hadden*, 3 Stew. Eq. 173; *Denton Cole*, 3 Stew. Eq. 246; *Hughes v. Nelson*, 2 Stew. Eq. 549.

If the bond and mortgage was assigned to defraud creditors the assignment will be set aside as to creditors, but is good between the parties. *Tantum v. Miller*, 3 Stock. 551; *Cutler Tuttle*, 4 C. E. Gr. 562; *Sayre v. Fredericks*, 1 C. E. Gr. 200; 1 Story's Eq. Jur. § 372.

Where a party makes a transfer of property for the purpose of committing a fraud, the law will not give him any aid to recover the same back. *Tantum v. Miller*, 3 Stock. 551; 1 Story's Eq. Jur. § 298; *Ruckman v. Ruckman*, 5 Stew. Eq. 259; *Cutler v. Tuttle*, 4 C. E. Gr. 562; *Baldwin v. Campfield*, 4 Hal. C. 891; *Crawford v. Bertholf*, Sax. 458; *Folly v. Vantuyt*, 4 H. C. 153; *Farlee v. Farlee*, 1 Zab. 285; *Cannon v. Cannon*, 11 C. E. Gr. 316; *Dilts v. Stevenson*, 2 C. E. Gr. 413; *Irons v. Smallpeace*, 2 B. & Ad. 551; 2 Spenc. Eq. Jur. 907; *London and Brighton Railway Co. v. Fairclough*, 2 Mann. & Gr. 697; *Westerlo v. De Witt*, 36 N. Y. 345; *Hackley v. Vrooman*, 2 Barb. 670; *Wallingsford v. Allen*, 10 Pet. 549; *Lucas v. Lucas*, 1 Atk. 270; *Martin v. Funk*, 75 N. Y. 134; *Sowerby v. Arden*, 1 Johns. Ch. 256, 258; *Minor v. Rogers*, 40 Conn. 512; *Richardson v. Richardson*, L. R. (3 Eq.) 691; *Morgan v. Malleson*, L. R. (10 Eq.) 475; *Wilson v. Hill*, 2 Beas. 14; *Black v. Black*, 3 Stew. Eq. 227; *Van Winkle v. Bellerille Mutual Ins. Co.*, 1 Beas. 335.

The opinion of the court was delivered by

GREEN, J.

This is a controversy between husband and wife, respecting the title to a bond and mortgage originally made to the husband, and alleged to have been assigned to the wife. It is

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form a foreclosure suit brought by the wife, now living apart from her husband, against the owners of the mortgaged premises. The bill sets out the bond and mortgage, and alleges that the husband by writing, under his hand and seal, assigned the same to one Richard L. Simonson; and that Simonson immediately assigned the same to the wife; that both assignments were duly acknowledged, and the one from the husband to Simonson was afterwards placed on record by the husband's direction. By virtue of the assignments, the wife, in her bill, claims title to the bond and mortgage as a gift from the husband.

The bill does not aver that the assignments, or either of them, were ever delivered either to Simonson or to the wife, but expressly charges that the bond, mortgage and assignments remained in the possession of Ruckman, as the husband and agent of the wife. The prayer is, that the husband may be decreed to deliver the securities and assignments to the complainant, and for a foreclosure and sale of the mortgaged premises.

The husband, who was made a party defendant, answered the bill. He admits the formal execution of the papers, but avers that the same never passed out of his hands or from under his control, and that no delivery thereof was ever made, either to Simonson or to the wife. He denies that she ever had possession of the assignments, or of the bond and mortgage, by virtue of any delivery, absolute or constructive, or that he ever held the same or any of them, as the agent of the wife or in trust for her.

The decree below was in favor of Mrs. Ruckman, in accordance with the prayer of her bill, and the case is now brought to this court for review.

The whole contest is between the husband and wife as to her title to the bond and mortgage. The owners of the equity of redemption make no defence. Ruckman is not asking relief. We are not called upon either to affirm his title or to declare the transfer fraudulent and void, as against his judgment and attaching creditors who were made parties to the bill. All these matters, though discussed on the hearing, may, for the purposes of this case, be safely laid out of view.

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To maintain her action it is necessary for the respondent to establish her title to the securities in question. The burden is on her. In her bill she claims title by virtue of the deeds of assignment, and charges that the transfer from Ruckman to her was good as a gift. The two assignments were executed simultaneously. They constitute but one transaction. Simonson was called in by Ruckman merely to act as a medium and instrument for passing the title. No delivery of either assignment was made to or by him. He merely affixed his name to an instrument prepared by Ruckman's direction without reading it or knowing the subject matter of the transfer. No title was vested in him. He disclaims all interest under the assignments made by Ruckman. Nor was it the intention of Ruckman to vest any interest in Simonson, but merely to use him as a medium for passing the title to the wife, should it become advisable to make the transfer. The two assignments may be considered as one instrument designed for passing title from the husband to the wife. Upon delivery to her, both would take effect as one deed.

The formal execution of the assignments by signing, sealing and acknowledging is admitted, but their delivery to the respondent is denied. This is the real issue in the cause. The transfer was purely voluntary and without consideration either valuable or meritorious. It does not fall within the line of cases where effect has sometimes been given by courts of equity to certain deeds, such as declarations of trust and family settlements, though retained in the custody of the grantor and never delivered during his life. It is subject to the universal rule upon which all the books agree, that delivery is one of the essential requisites to the validity of a deed.

Was a sufficient delivery of the assignments made to the respondent to vest the title to the mortgage in her? The essence of the delivery consists in the intent of the grantor to perfect the instrument, and to make it at once the absolute property of the grantee, and his acts and declarations are the evidence of such intent. If both parties be present, and the usual formalities of execution take place, and the contract is to all appearance com-

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suminated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor. But where there is not an actual transfer of the deed, it must satisfactorily appear either from the circumstances of the transaction, or the acts or words of the grantor, that it was his intention to part with the deed and put the title in the grantee. *Folly v. Vantuyl*, 4 Hal. 153; *Farlee v. Farlee*, 1 Zab. 279, 286; *Crawford v. Bertholf*, Sax. 458; *Cannon v. Cannon*, 11 C. E. Gr. 316; 4 Kent's Comm. 456; 3 Wash. R. P. 581.

In this case, there is no evidence that either of the assignments was ever delivered to the respondent. She was not present at their execution. They never came into her hands. She never heard of the transfer for more than six months afterward. No one was present when the papers were executed but Ruckman, Simonson and the attorney who prepared them, and possibly one of his clerks. So far as appears by the evidence, not an act was done or word said by the appellant evincing any intent on his part to perfect the instrument, and to part with its possession or his control over it. On the contrary, he directed the attorney to send the assignment from Ruckman to Simonson to the clerk's office for record; and the one to the respondent he placed with the bond among his papers in the bank, where it remained, according to Ruckman's account, until he destroyed it. The assignment was not made in pursuance of any contract or arrangement with the respondent, and no presumption arises from the mere fact that it was acknowledged, so long as it remained in the possession and under the control of the grantor. Even if it was the intent of Ruckman at the time of the execution of the papers to perfect the gift by delivery, still it was revocable until carried into effect. A mere intention or promise to give, without some act to pass the property, is not a gift. There exists the *locus penitentiæ* so long as the gift is incomplete and left imperfect. 2 Kent's Comm. 438.

In *Pringle v. Pringle*, 59 Pa. St. 281, the same principle was involved as in this case. The question arose upon the assignment of a promissory note. Mr. Justice Sharswood, in his opinion, says:

1900

1901

1902

1903

MARGARET

1904

1905

1906

1907

This case was affirmed by the Supreme Court of the United States in the case below, 100 U.S. 210.

DANIEL F. TOMPKINS and wife, appellants,

v.

DAVID CAMPBELL, respondent,

and Adams, for appellants,

and Harris, for respondent.

This case was affirmed by the Supreme Court of the United States for reasons given by the Court, 170 U.S. 170.

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either of the assignments or of the mortgage itself, and for this reason she must fail in her action, both against the assignor and the owners of the equity of redemption. It is a well-settled rule that courts of equity will lend no assistance towards enforcing a mere voluntary contract while it remains *in fieri*. Courts will only enforce gifts and assignments *inter vivos* when the assignment is perfected and complete. If anything remains to be done to complete the title of the donee, courts of equity, treating the donee as a mere volunteer, will not lend aid to carry it into effect. *1 Story's Eq. Jur.* § 706, and cases

In disposing of the question of costs, the court desires to draw attention to the amount and nature of the testimony taken in this cause. The printed book contains nearly three hundred pages of evidence, not one-tenth of which has any direct bearing upon the real issue between the parties. The remainder consists of inquiries into the private affairs, social status, domestic relations, and general moral or immoral character of the parties, much of it totally irrelevant, and much of it disgusting in its details. The taking of such testimony is an onerous tax upon the parties, and the reading of it an imposition on the court. No decree therefor will be allowed either party as against the other. The decree should be reversed, and the complainant's bill dismissed, but without costs, either in this court or in the court below, as between the parties to this appeal. The respondent's bill, the bond and mortgage having entirely failed, the bill should be dismissed as to the other defendants, but no appeal having been taken on their behalf, they must seek relief in the court of chancery, and apply for the dismissal there.

reversal—BEASLEY, C. J., DEPUE, KNAPP, SCUDDER, SYCKEL, CLEMENT, COLE, DODD, GREEN—9.

affirmance—MAGIE, REED—2.

Colt v. Miller.

MORGAN G. COLT et al., appellants,

v.

ELIAS N. MILLER, administrator, &c., respondent

Messrs. Bedle, Muirhead & McGee, Mr. Ashbel Green and B. Williamson, for appellants.

Messrs. C. & R. W. Parker, for respondent.

PER CURIAM.

This decree unanimously affirmed for reasons given chancellor in the case below, *5 Stew. Eq. 6*.

MARGARET CRATER et al., appellants,

v.

JACOB WELSH, executor, respondent.

Mr. A. Q. Keasbey, for appellants.

Mr. Alfred Mills, for respondent.

PER CURIAM.

This decree unanimously affirmed for reasons given chancellor in the case below, *5 Stew. Eq. 177*.

DANIEL F. TOMPKINS and wife, appellants,

v.

DAVID CAMPBELL, respondent.

Mr. Fred. Adams, for appellants.

Mr. Elwood C. Harris, for respondent.

PER CURIAM.

This decree unanimously affirmed for reasons given chancellor in the case below, *5 Stew. Eq. 170*.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY,
FEBRUARY TERM, 1881.

THEODORE RUNYON, ESQ., CHANCELLOR.

BRAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

HULDAH H. SCHANCK

v.

CHARLES W. SCHANCK.

a wife in anger told her husband that he "might go his way and she
hers," and gave other evidence of her desire that they should live
but immediately retracted and besought him not to go, and he, not-
ling her entreaties, left her, in a passion, and, without any attempt at
ation and without contributing anything towards her support or even
cating with her in any way, remained away from her for three years,
the time in the same county with her—*Held*, that she was entitled to
for desertion.

for divorce. On final hearing on pleadings and proofs.

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Mr. W. T. Hoffman, for complainant.

Mr. B. Gummere, for defendant.

THE CHANCELLOR.

This suit is for divorce from the bond of marriage brought by a wife against her husband. The ground is wilful and obstinate desertion of the complainant for a period of two years and more before the filing of the bill. The time of the beginning of the desertion is the 25th of January, 1871. The parties were married in this state, in January, 1868. They are and have been ever since the commencement of the alleged desertion, and were previously thereto for about five years, residents and inhabitants of Monmouth county. In the greater part (and indeed almost all) of the large amount of testimony which has been taken in the cause has referred to matters (the history of the married life of the parties prior to the desertion) which in my view of the case it is not necessary or profitable to advert to at any considerable length. As to the main facts will be enough on that score. Immediately after their return from their wedding tour the parties went to the city of New York, where the defendant was engaged in business as a broker. They boarded there until the middle of 1871, when he failed in business. He proposed to his wife to live with his parents in One hundred and fifty-second street, but she preferred to come out to Keyport, where her parents lived. They came out accordingly, and boarded with her father in the spring of 1872, when they went to his mother's farm at Cream Ridge, in Monmouth county. They remained there until scarlet fever broke out in the tenant's family (seven persons being ill of the disease at the same time), and then the complainant returned to her father's house, but the defendant remained. The complainant, after six weeks' stay at Keyport, returned to Cream Ridge and stayed till November, 1872, when her husband went to Keyport, and from there, in sam

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Brooklyn. They boarded in the last-mentioned city until April, 1873, being supported by an allowance of \$25 a week, made to the defendant by his father. While in Brooklyn, the defendant endeavored to obtain employment as a clerk, but without success. In April, 1873, his father having met with losses in business, refused to continue the allowance, but invited the parties to come to Cream Ridge, offering to board them in his house and pay the defendant \$1 a day for his services around the place. The defendant, having no other resources, went accordingly, but the complainant was unwilling to go, and remained with her parents at Keyport, which is about thirty-five miles distant from Cream Ridge. The defendant, on the one hand, attributes her refusal to live with him at the farm to her dislike of agricultural life and her mortification at his accepting employment so far below the measure of his capabilities. She, on the other hand, avers that the reason was merely her unwillingness to live with his mother, whose sour temper and unpleasant treatment had rendered her unhappy during her previous stay there. The defendant continued at the farm until the spring of 1874, when he entered into a new agreement to work it "on shares;" he and his wife to have for their occupation a part of the house separate from that occupied by his parents. The complainant refused to go there. In February, 1874, an agreement was suggested and drawn up by a friend of the defendant's, at whose house the parties were paying a short visit of a few days together, by which the defendant, on the one hand, agreed to make an effort (by going to New York to "board, advertise and answer advertisements" for ten days, if his parents would furnish the money), to get employment in New York or its vicinity at a salary of not less than \$600 a year with a prospect of promotion, and she, on the other hand, agreed that if he should make the effort and fail, she would go to the farm and without complaint perform her duties there. She declined to go, however, and stayed with her parents; her husband remaining on the farm, working it under the agreement, and visiting her occasionally. In January, 1875, he was at her father's house on one of his visits, and while there the occurrence took place from which the complainant dates the

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desertion, and of which it will be necessary to speak at length. The defendant then left the complainant, and though he has ever since lived on the farm and she at her parents' house in Keyport, he had never, up to the commencement of this suit, contributed to her support or even communicated with her in any way. The transaction of January, 1875, just referred to, occurred on Friday night and Saturday morning, the 19th and 20th. The complainant narrates it as follows:

"Friday night we were talking, and I wanted him to get something to do, and got to talking about it, and he got angry with me, and I can't tell you what he said, but he left the room; that was the time he went out of the house when he said he walked round several times, and then he came back again; he was talking about everything; he wanted me to live with his mother, and I said I would not do it; then I wanted him to get something else to do, and we were talking about that; then he came back and went to bed, and the next morning he went to New York. Sometime before that, the visit before, when he came to our house, he asked me for the ring that was given with the understanding that when I was tired of him, I would give it to him; but he took it away from me himself, and I cried and he gave it back to me; and he had before repeatedly asked me when I was tired to give him that ring back and he would understand; after we had those words Friday night, Saturday morning I turned round and gave him that ring; I did so because I felt completely tired out with him—worried and worn out, completely exhausted—so that I thought that I could not stand it any longer; he took the ring and we then went down to breakfast; he was very pleasant and talked with them all; I was very silent, and when we went out of the dining-room door, he did not say good-bye to me, so I said to him, 'Ain't you going to kiss me good-bye?' he said 'Yes,' and kissed me and left; he came back Saturday night with the boat and treated me very coolly and indifferently; he did not say anything—did not say a word; I don't think we said five words to each other; the evening passed, and at night we retired; he and my father had a long conversation, and I heard him say that he had made so much on the farm—between \$400 and \$500—and my father said, 'Haven't you got anything for your wife when you have made so much?' he said, 'Sometime I will give her something;' then I went up stairs and thought it all over; I thought I could not live this way any longer, so I went down stairs and said to him, 'You can go your way and I will go mine; I can't stand this way of living any longer;' I went up stairs, and after awhile he came up and said, 'Where is that tin box with the papers?' and with that he kissed me good-bye, and as he got to the top of the stairs I ran out and took him by the coat, and he jerked himself away, so that he hit himself against the wall, and I halloed to him to come back; he paid no attention to me, and that was the last time I saw him."

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She gives as the reason why she ran after him and pulled him back, that she "had feeling for him, and felt sorry." She says that when he went away it was between ten and eleven o'clock at night. It appears that what she cried after him to induce him to come back, was "Charley, won't you come back?" She testifies that when she gave him the ring, and said he might go, she meant, not that he might go forever, but only for that time. From his testimony, which corroborates her in all essential respects in this narrative, it appears that the ring was given before their marriage, and that the understanding which she said existed between them as to using it as a means of denoting her desire to be released from him, had reference to their betrothal merely. He also says that when she told him he could go his way and she would go hers, her manner was sorrowful. It is quite evident from all the testimony on the subject that the difficulty between them arose from the complainant's dissatisfaction with the effort made by the defendant to obtain more suitable employment, and her conviction that she would be unable to live comfortably with his mother on the farm. There seems to be no reason for doubt that that conviction was well founded. It is urged, however, on behalf of the defendant, that it was her husband's right to choose his employment and his place of residence, and it was her duty to accept his choice, and go with him to his domicile and reside there with him. The decisive question in this case is not, however, whether the complainant was right or wrong in refusing to go with her husband to the farm and accept his selection of a pursuit and place of abode, but whether what took place between him and her, as above testified, justified him in abandoning her, in depriving her of his society and of all support, and in never making any, even the least, effort to ascertain whether she had not changed her mind, or could not be induced to do so. It is urged, in his behalf, that when she gave him the ring and subsequently told him he might go his way and she would go hers, she, in effect, deserted him, or at least expressed her desire for or consent to an indefinite separation. But she swears, and her statement is corroborated by the circumstances as detailed in the testimony, that she had no inten-

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tion of expressing a desire for a final separation, but only to express her resolve in regard to the subject which was the cause of difference between them. She appears to have intended to express only her determination not to go to the farm to live if she had to live in the same house with his mother, and that, too, merely because of her conviction that she could not live in comfort there with his mother. But, moreover, after she had given the ring and made that expression, and her husband had gone out of the room to go out of the house, she strove to detain him, and called after him in a tone of entreaty, "Charley, won't you come back?" thus showing that she did not wish him to go, but desired that he should return to her in order that the subject might be further considered, perhaps with a view to a submissive compliance on her part with his wishes. Her father, as the defendant left the house, invited him to stay for the night, but the defendant, conceiving that he had been treated with indignity in what had passed, refused to listen to the entreating call of his wife or her father's exhortation. For three years and a half before the bill was filed he denied his wife any, the least, attention or recognition, but permitted her to live in a state of separation from him, wholly dependent on her family for her support. His reason for it seems to have been the wound which his pride received when his wife told him he might go his way and she would go hers. Under the circumstances of the case, the husband owed a duty to his wife—a duty to society—to avoid, as he well might have done, the consequences which his punctilious resentment (so exacting that he would not even condescend to propose the terms on which it might be appeased), has inflicted upon his wife. He was not at liberty to leave her uncared for and unprotected. If his excuse were her refusal to live on the farm, it could not be accepted, for he abandoned her in January, while the arrangement under which she refused to live on the farm was not to take effect until April following. But the expression of her resolution not to live on the farm was not, in fact, the occasion of his withdrawal from her. His complaint against her was not on that account, but on the ground of her treatment of him on the occasion of his last visit to her. He says that all

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At the time he expected she would come to him at the farm. Indeed, he corrects the record of his testimony lest he should be misrepresented where it made him say that she had not offered to live in the tenant-house on the farm. The proof is clear that he was quite willing to do that, and had offered to do it; that he was not unwilling to live on a farm, or on his mother's farm, but was not willing to live in the same house with his mother. Manifestly, he was actuated in his abandonment of her merely by resentment and pique. When asked on the witness-stand whether his going away from her and refusing to see or communicate with her was because he would not sacrifice his dignity sufficiently to do so, he replied that he "would not under the past circumstances and her orders," and he admits that he never, after his withdrawal, signified to her the possession on his part of the slightest interest in her welfare, or contributed of his means a single cent for her support, or offered her a home with him. And he bases his justification of his conduct towards her on his regard for his self-respect, saying that he never expected to cross her father's threshold again until he should have received her invitation or that of her family to do so.

It is clear that she never intended to desert him. Her letters introduced in evidence by him contain the very strongest expressions of affection, and were undoubtedly sincere. Were he before the court asking a divorce from her on the ground of desertion, his application would be denied for the reason that he has been delict in his duty towards her under the circumstances. *Jennings v. Jennings*, 2 Beas. 38; *Cornish v. Cornish*, 8 C. E. Gr. 406; *Bowlby v. Bowlby*, 10 C. E. Gr. 406. In *Cornish v. Cornish*, which was a suit by a husband against his wife for desertion, the husband had come home late at night and the wife was slow in admitting him into the house. Hearing her tardiness and discontent at being so disturbed, he proceeded to chastise their child of a year old because, having been awakened by the noise of the altercation, it very naturally cried. He picked the child up and flew into a passion, and declared his determination to leave the house (her husband's father's) and to go to his father's house as a refuge from such treatment, and that

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she would never live with her husband again and w divorce. Her husband harshly bid her look to the co of such a step. She went home that night. Said the c in refusing the divorce :

“He [the husband] sent her away in this mood at midnig hired man, to her father's house, three miles distant. He has n her since, to seek for reconciliation or ask her to return. He has number of times without speaking to her. Her temper may be t too violent, but it was his duty to go to her after leaving under tl stances, and see if some contrition, some concession on his part, w away with the effect of his harsh conduct on that night. Her tl anger of the moment, never to live with him and to obtain a di sufficient excuse for not making the attempt. He has acted as anxious to convert a small quarrel between him and his wife, in w both much and most to blame, into a legal ground for divorce. made the advances or concessions which a just man ought to have an end to this desertion.”

That reasoning is applicable to the case under con It declares and defines the duty of the husband under cumstances as are presented here. And the reasoning i on a just view of the marital relation which imposes husband the duty of maintaining, for the benefit of hi his wife and also of society at large, the integrity of t monial tie, and to that end requires of him effort, and, i concession and persuasion. To the same purpose and in strain is the language of the court in *Yeatman v. Yeatm* (1 P. & D.) 489 :

“It would be of evil example if this court should hold that me temper, unless shown in some marked and intolerable excesses, w able ground to justify a man in throwing a young wife upon the w the protection of his home and society. A woman so placed is o temptations. If she fail to resist them the husband who has alr her will not be slow to take advantage of her fall, making his own first step towards a claim for divorce. True, she may at once insi ing to him, and may obtain a decree obliging him, if within the of this court, to receive her again, and thus terminate the des angry feelings, the prompting of pride or the advice of others ma The wife may not be inclined to protect herself by forcing her so husband bent upon casting her off, and if the result is criminality,

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fault still lies at the husband's door. If submission is the part of the wife, protection is no less that of the husband, and he is bound to extend that protection to his wife, even against herself and her own impulses, so far as the fences, the restraints and the inducements of conjugal cohabitation may serve to that end."

In this case, it is pertinent to say the defendant gives, as one of his reasons for not going to see his wife, that "he had heard reports, too, that were not complimentary." The reports to which he refers appear to have been the merest idle village gossip, but such as they were she would in all probability have been spared the annoyance and mortification of being the subject of them if her husband, thinking more of his wife than of his pique, had done his duty towards her. It is to be observed that the marital relation between these parties remained unbroken up to the time when the withdrawal took place, and that it was broken only by the defendant's ceasing to visit his wife. After he left her he neither requested her to come to him or to visit him at any place. He never proposed to her any terms of condonation of what he appears to have regarded as her offence against him. When he saw her he would not recognize her. In short, in all things he treated her as a mere stranger.

The husband who withdraws himself wholly from his wife's society, refusing to make any provision for or have any communication with her, *prima facie* deserts her, and if he continues such treatment for three years, she will, in the absence of lawful excuse on his part, be entitled to a divorce. The defendant has so dealt with the complainant in this case, but to rebut the presumption to which his conduct gives rise, he by his answer alleges (denying the desertion while he admits the withdrawal) that he has informed her that his house on the farm was always open to her and that it was his greatest desire that she should come and live with him, but she refused again and again until he lost all hope of reconciling her to his life and home on the farm. But in point of fact he has never communicated with her at all on any subject in any way since he left her. That he intended to abandon her there can be no doubt, for he did actually abandon her. That he never placed any limit to the time

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the abandonment was to continue, as by imposing terms or conditions her compliance with which would restore marital relations between them, is equally indisputable. It is also beyond question that he manifested no desire for nor expressed any expectation of a renewal of connubial relations. He left her without providing for her support, and has lived in the same county in which she has resided ever since, and for three years and more before this suit was brought he treated her as if he had cast her off forever, and gave her to understand nothing to the contrary. He has made himself amenable to the law which authorizes the court to decree a divorce for three years' willful, continued and obstinate desertion.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY et al.

v.

THE STANDARD OIL COMPANY et al.

After the court had refused a preliminary injunction for the removal of an oil pipe and to prevent its use by defendants, and had discharged an *ad interim* order staying the defendants in the premises, and an appeal therefrom had been taken and was pending, an application to this court to continue such *ad interim* order, merely on the ground of the appeal, was denied.

Motion to continue *interim* stay pending determination of appeal.

Mr. B. Gummere, for the motion.

Mr. R. Gilchrist and *Mr. A. P. Whitehead*, of New York, *contra*.

THE CHANCELLOR.

On the filing of the bill in this cause an order to show cause

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injunction should not be issued pursuant to the prayer was granted, with an *ad interim* stay prohibiting the the oil company, from using the pipe for the convey-

The bill complains that the defendants have with-ty invaded and usurped the property and franchises plainant company by laying pipe for the conveyance m across the property of the latter, and near and f a bridge across the railroad, which the complainants when the pipe was laid, and still is, the property of l company. The pipe was laid in what is claimed by nts to be the space taken by condemnation by the authorities of the city of Bayonne, for a public street, ace the bridge is. The prayer of the bill is, that the may be enjoined from interfering with the complain-removal of the pipe from the bridge and from over l tracks, and from interfering with the complainants or for any purpose using, any pipe either over, on or omplainants' railroad tracks in Bayonne or elsewhere, nanner, for the purpose of laying the pipe, interfering upying the complainants' railroad; and generally for

The defendants answered the bill, and the order to was argued on the pleadings and depositions and each side, and the questions in dispute between the ere very fully and ably presented and discussed on and after full and very deliberate consideration the lischarged. This, of course, dissolved the temporary

e following cases hold that after an order refusing an injunction, i to continue or re-instate such injunction is not maintainable in court (*Graves v. Graves*, 2 Hen. & Munf. 22; *Galloway v. London*, Sm. 59, 11 Jur. (N. S.) 537; *Spears v. Mathews*, 66 N. Y. 127); ppeal from such order revive or continue it (*Chegary v. Scofield*, 5; *Hicks v. Michael*, 15 Cal. 107; *Wood v. Dwight*, 7 Johns. Ch. ee Co. v. *Davis*, 40 Ga. 309; *Garrow v. Carpenter*, 4 Stew. & Port. l v. *Detroit*, 24 Mich. 322; *Dutcher v. Culver*, 23 Minn. 415; *Jew-Bank*, Clark Ch. 59; *Hart v. Albany*, 3 Paige 381; *Fellows v. Abb. Pr.* (N. S.) 1; *Blount v. Tomlin*, 26 Ill. 531).

ng cases hold otherwise, but in some instances the proceedings (*Penrice v. Wallis*, 37 Miss. 172; *Levy v. Goldberg*, 40 Wis. 308;

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stay contained in it. From the order denying the preliminary injunction the complainants have appealed, and they now move for a continuance of the *ad interim* stay during the appeal. Whether, on the dissolution of an injunction, the court will continue the prohibition pending an appeal from the order, is in the discretion of the court. The 148th and 149th rules of court provide that an appeal from an interlocutory order or decree shall not stay proceedings without an order of this court, or of the appellate tribunal, to be granted on such terms as the court may see fit to impose. And in case of appeal from a final decree, the appeal, if taken in ten days from the filing of the decree, shall operate as a stay of execution, unless this court or the appellate court shall otherwise order; that is, if the appeal be taken within ten days, no execution shall be issued without order, and if not taken within that time, and execution shall have been issued, the appeal will not stay it unless so ordered. In either case, the application, whether for execution or for a stay, is addressed to the discretion of the court, and will be granted only on good cause shown. *Schenck v. Conover*, 2 Beas. 31.

"If the court," said the Chancellor (Green) in the case just cited, "in the exercise of this discretion, see that in case the decree should be reversed the party cannot be set right again—if the complainant proceeds to a sale under his execution—there is a strong reason for a stay of execution. If, on the other hand, the stay of execution is unnecessary to protect the rights of the appellant under the appeal and must operate prejudicially to the complainant, the court ought not to interfere."

Turner v. Scott, 5 Rand. 332; *Bressler v. McCune*, 56 Ill. 475; *Yocom v. Moore*, 4 Bibb 221; *Pittsburgh R. R. v. Hurd*, 17 Ohio St. 144; *Williams v. Pouns*, 48 Tex. 141). Whether application for a continuance may be entertained by the chancellor, after an appeal, see *Hart v. Albany*, 3 Paige 381; *Sixth Ave. R. R. v. Gilbert R. R.*, 3 Abb. N. C. 53; *Dutcher v. Culver*, 23 Minn. 415; *Haynes v. Hayes*, 63 Ill. 203; *Eldridge v. Wright*, 15 Cal. 88; *Penrice v. Wallis*, 37 Miss. 172; *Helm v. Boone*, 6 J. J. Marsh. 353). Where a restraining order, granted on a rule to show cause why an injunction should not issue, falls with the refusal of the injunction, it is neither appealable nor revived by an appeal from the order refusing the injunction (*Powell v. Parker*, 38 Ga. 644; *Ogle v. Dill*, 55 Ind. 130; see *Huntington v. Nicoll*, 3 Johns. 566; *Citizens Bank v. Walker*, 26 Ark. 468).—REP.

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In the English practice such applications are not, in general, ordered, *Eden on Inj.* 375; 2 *Joyce on Inj.* 1319, 1320. In *Whithouse v. Corporation of Bedford*, 17 *Ves.* 380, 382, Lord Eldon said that the execution of the decree would not be stayed in chancery on appeal unless the court saw that if it should turn out to be wrong the party could not be set right again. In *Walford v. Walford*, L. R. (3 Ch.) 812, Lord Justice Sir W. Page Wood, speaking on the subject, says the correct course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant and where inconvenience and annoyance are not enough to take away from a successful party the benefit of his decree. In this state, in *Van Walkenburgh v. Rahway Bank*, 4 *Hal. Ch.* 725, where the application was to the court of errors and appeals on an appeal from an order dissolving an injunction, for an order in the nature of a temporary injunction retaining the parties and subject matter of the controversy *in statu quo* until the final hearing of the appeal, the court said that the application was addressed to the sound discretion of the court, and that when an injunction has been dissolved by the chancellor, the appellate court, upon appeal from that order, would usually revive the injunction, either (1) upon a temporary injunction bill when the whole matter in controversy is the continuance of the injunction, and where, consequently, the whole object of the suit would be defeated if the party were not temporarily restrained by the order of the appellate tribunal; or (2) where it clearly appears that the intervention of the power of the appellate tribunal is necessary to prevent great and irreparable mischief to the rights of the appellant.

In the case in hand, no material injury is to be apprehended from the refusal to continue the injunction. The pipe had been laid when the bill was filed. The stop order was merely against the use of the pipe for the conveyance of oil until the order to allow the cause could be heard. No injury from leakage in such use of the pipe is reasonably to be apprehended. Nor is any to be anticipated from the presence of the pipe in case the complainant should desire to raise the bridge. The pipe crosses the air space above the railroad at the same height as the bridge, and

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until the railroad company or the receiver shall wish to raise a bridge, it cannot be in their way. If it shall be found to be so when the bridge is to be raised, this court can protect the railroad company's rights, whatever they may be, in the premises. As to the alleged infringement of the complainants' franchise, it does not appear to exist. It is urged, however, that the complainants insist that the oil company has usurped its property, and to permit the latter to continue to do so, is an irreparable injury. But it is a question to be determined whether such usurpation has, in fact, taken place, and, seeing that the pipe had been laid when the bill was filed, and there is no danger to be apprehended from the use of it for the conveyance of oil, or any inconvenience from its presence in case the complainants should determine to raise the bridge, it is clear that no material injury will arise from the refusal to prevent, before the final hearing, the oil company from using the pipe. There is, in fact, no material injury to be fairly apprehended from the refusal to enjoin *in limine*.

It is further urged, however, that such refusal will inflict irreparable injury on the complainants, because it will render relief more difficult, if not impossible, by reason of the fact that under the license which, as the complainants insist, the refusal substantially gives, the oil company may expend money in the enterprise of which the pipe is part, and thus create complications which equity will regard as obstacles to the granting of the rights of the complainants, while such obstacles will be prevented by a continuance of the stay. But as was said in *Easton v. N. Y. & L. B. R. R. Co.*, 9 C. E. Gr. 49, 59, in answer to a like suggestion, the oil company will receive no license or immunity from the refusal of the court to interfere with it on the application for a preliminary injunction. After the bill has been filed, and it has been called into court on the charge of invasion and usurpation of the railroad company's property, if the oil company proceeds in the same direction, it must be at its peril. In denying the *interim* interference asked for, the court has not decided that the oil company is in the right in the matters complained of, except so far as the complainants' claim is based on alleged interference with the franchise of carrying goods for tolls.

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It is that this court has determined is, that there is no ground to justify a preliminary injunction, and that it will wait until the final hearing to see whether it ought to issue its prohibitory mandate. I regard the language of Lord Brougham, in *Walburn v. Ogilby*, 1 M. & K. 61, 86, as apposite. The application was to stay, pending appeal from it, the execution of an order for production of books and documents.

“It has been said more than once in this place, that such applications are better made in the House of Lords. And in one of the cases, Lord Eldon treated such an application as a misapprehension of the party's proper course, on the ground that the chancellor's order refusing to stay might itself be appealed from, and so on without end. He added, as another reason, that the court of appeal has the power of protecting the party in the possession of the judgment against any vexatious delay consequent on the stay, by advancing the cause where it has been decided fit to grant the application. * * * I had every inclination, originally, to grant this application; and if, on conferring with others whose experience gave great weight to their opinions, I had found that any doubt was entertained upon the matter of the order or of this motion, I should probably have stayed the execution. But even then I am not sure that I should have done right; for certainly it would be giving encouragement to vexatious appeals upon a large class of the business which occupies these courts. Indeed, were this motion granted upon the allegation that refusing it will enable a party to do something which cannot be undone, or to obtain some advantage which can never afterwards be wrested from him, it is impossible to conceive any case of an order for paying money out of court, for dissolving an injunction for appointing a receiver, in which the same ground existing much more plainly, the same course must not be pursued, and thus in the very cases where it is of the most essential importance that speedy execution should take place, the very cases in which this court possesses its peculiar jurisdiction because of that urgent necessity, will be those in which the argument for suspending execution will be most powerful. In other and better words, in the language of Lord Eldon, the arm of the court will indeed be palsied.”

If the order complained of were an order dissolving an injunction, and the bill be regarded as a pure injunction bill, the stay would not be continued unless, in the language of the court in *Van Walkenburgh v. Rahway Bank*, the object of the suit would be unavoidably defeated if the defendant were not immediately restrained, or it clearly appeared that the intervention of the power of injunction was necessary to prevent great and irreparable mis-

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chief to the rights of the complainants. I do not see that ~~the~~ the object of the suit will be defeated, or irreparable injury be ~~done~~ done to the complainants, if the stay be not continued.

But in addition to the foregoing considerations, there is another ~~er~~ which is entirely conclusive in this case. The complainants have never been in possession of any judgment of this court in favor ~~of~~ of their claim to interlocutory interference. No injunction ~~was~~ was granted to them. On the filing of their bill they obtained not ~~an~~ an injunction, but an order to show cause why an injunction should not be issued. The *interim* stay before mentioned, prohibiting ~~the~~ the oil company from conveying oil by the pipes, was indeed incorporated in the order; but it was granted only to give the court opportunity, without prejudice to the rights claimed by the complainants by the delay necessary for the inquiry, to inquire, ~~on~~ on notice, whether there ought to be any preliminary injunction ~~or~~ or not, to enable the court to be careful and circumspect and regard ~~ful~~ full of the rights of both parties in the use of the injunction power. The fact of the granting of such a stay can give the party obtaining it no claim whatever to a continuance of it in case of refusal to enjoin and an appeal from the order of refusal; for it is granted only pending preliminary inquiry. It is merely a prudential interference, limited to the time when the court shall have reached a conclusion as to the propriety of granting an interlocutory injunction. It appears to me too obvious to admit of any dispute or argument, that it is the duty of the chancellor in such a case, where he concludes on such inquiry that there should be no preliminary injunction, to refuse to continue the stay. If the argument of the complainants on this point is well founded, such a stay, though followed by the clearest conviction on the part of the court, after hearing the order to show cause, that an injunction ought not to be granted, must be continued because of the mere fact of the taking of an appeal by the complainants. This would, in effect, be putting into the complainants' hands, to a certain extent at least, the power of continuing the stay. The true ground is, that the question whether the stay shall be continued or not is addressed to the discretion of the court, and the fact that the complainants have appealed from the order discharging

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, gives them no right whatever to its continuance, and in no way and to no extent whatever binds the court to continue it. In the case under consideration there is no ground for continuing the day. The motion, therefore, will be denied with costs.

DAVID S. HUTCHINSON

v.

MARGARET ABBOTT et al.

1. Usury may be set up by the owners of the premises and by subsequent encumbrancers, under the petition of the holder of a mortgage for the surplus money remaining in this court after satisfying prior mortgages.

2. A promise by one of the mortgagors to the assignee, made after the assignment, to pay the interest on such mortgage promptly, does not estop him from setting up usury in the principal or in the interest previously paid; nor does a claim by one of the mortgagors, to have the full amount of such mortgage deducted by the assessor from the taxes on the premises, amount to an estoppel.

Bill to foreclose. On application by petition for surplus money. Exceptions to master's report.

Mr. A. G. Richey, for petitioner.

Mr. J. S. Aitkin, for respondents.

THE CHANCELLOR.

This is an application for the payment of the third mortgage out of the surplus money remaining after paying out of the proceeds of the sale of the mortgaged premises under the execution the amount due on the first mortgage, with costs and execution fees. There is a like application pending in behalf of

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the holder of the second mortgage. The petitioner is Matthew H. Miller. His mortgage is for \$1,000 and interest, and was given February 23d, 1872, to Edward H. Murphy, and by him assigned to Miller, July 2d, 1873. The contestants are the holders of the fourth and fifth mortgages, and the widow, executors and devisees of Edward Abbott, deceased. All the mortgages on the property, except the first, were given by the executors. The contestants insist that Miller's mortgage was invalid and usurious in its inception, and, if valid, is subject to certain credits for excess of interest paid and for premium taken by Murphy to extend the time of payment of the principal. The fourth and fifth mortgages were both given after the petitioner's mortgage was assigned to him. The master to whom the petition was referred reported that the sum of \$800 only of principal was due to the petitioner, but that, under the facts of the case, interest should be allowed upon it, deducting the excess of interest paid on the mortgage over what was due thereon under those facts; and that the petitioner was, therefore, entitled to receive out of the surplus money, after payment of the money due on the second mortgage, \$800, with interest thereon from April 1st, 1876, less such excess of interest.

The master finds that the petitioner's mortgage was and is usurious; that when it was made it was agreed between the mortgagors and mortgagee (Murphy) that the latter should advance only \$900 of the \$1,000 mentioned in and secured to be paid by the mortgage, and should retain \$100 for premium for the loan; and he also finds that interest was paid on the \$1,000 from the date of the mortgage to April 1st, 1870; and that on the 1st of April, 1873, \$100 were paid to Murphy, by agreement between him and the mortgagors, for an extension of the time for paying the principal for one year. He therefore, allowing interest on \$800 from April 1st, 1876, up to which time the interest was paid, to the time of payment out of the surplus fund, deducts \$119.40 as the interest on \$1,000 from the date of the mortgage to April 1st, 1873, (\$77.40), and interest on \$200 (\$42) from the latter date to April 1st, 1876, together, \$119.40. The matter comes before me on exceptions to the master's report by petitioner and respondents.

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be proper to notice, in the first place, the exception he respondents to the validity of the petitioner's mortgage-allegation being that the executors, by whom it was executed without authority. The will provides as follows:

any one or more of my children, with the approbation of my executors, if it seem them expedient to leave their common household before they are named for the inheritance in fee simple as aforesaid, and live separately at their own cost to my estate, and shall desire pecuniary assistance from it in a proper business or situation, I hereby authorize my executors to meet their approbation, to borrow or obtain on my estate any sum, not exceeding \$1,000, to pay the same to such child on his or her demand therefor, which payment, without interest, shall be accounted for by the executors or her in the inheritance and distribution as aforesaid."

Answer put in by the widow and executors and devisees of the will of Abbott in this cause merely denies that the mortgage is a valid instrument, and alleges that if valid, it is for more than the whole amount of \$1,000 due thereon, and it is on general terms, denies the validity of the fourth and fifth clauses. There is no proof whatever, however, on the subject of the will, and by that the executors had power, under the circumstances, as appears above, to mortgage the property. The exception under consideration will, therefore, be

consider the exceptions filed by the petitioner: It is argued in his behalf that the contestants cannot set up usury against him because it has not been pleaded in the cause; but because the holders of the fourth and fifth mortgages filed their bills alleging the usury, in which way alone it is insisted that they should have availed themselves of the defence of usury to impeach the defendants' mortgage. It appears that neither they nor the executors answered the bill. The executors and devisees did, but they did not set up usury. Under the circumstances, however, a decree may be made on the application for surplus money. See *Whitcomb v. Franklin*, 6 C. E. Gr. 334, cited by petitioner's counsel. Where one defendant, a mortgagee, had answered, in respect to the mortgage of another defendant who had not answered, it was said that the rights of the defendants could be

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settled on application of either for the surplus money or by ~~cross~~ bill, as they might deem best. I see no objection to permitting usury to be set up in this case on this application. The proceeding is a direct one, an application to the court for payment of the petitioner's mortgage out of the surplus. The other defendants are called into court to respond to the claim, and they may do so by setting up usury. But it is insisted that there was no usury, and if there was the mortgagors would be, and those who claim under them are, estopped from setting it up. The proof, however, is that when the petitioner's mortgage was made, Murphy, the mortgagee, took a premium for the loan of \$100. Murphy testifies that the application for the loan was made to him by Samuel L. Abbott, one of the mortgagors, (who seems to have negotiated it, and that on the application he told Abbott he would charge him \$100 for making the loan. Abbott swears that the \$100 were not for expenses, but for a "bonus," and Murphy does not deny it. The mortgagors received only \$900. The usury is clearly proved. It is also proved that on the 21st of March, 1873, a note for \$100 at one year was given by two of the mortgagors to Murphy, pursuant to agreement between them and him in consideration of his agreement to extend the time for payment of the mortgage for one year, and the note appears to have been paid. The master properly credited the amount of this note on the principal of the mortgage. *Nightingale v. Meginnis*, 5 Vr. 461; *Trusdell v. Jones*, 8 C. E. Gr. 121; *S. C.*, on appeal, *Id.* 554; *Terhune v. Taylor*, 12 C. E. Gr. 80.

But the petitioner insists that the mortgagors and the holders of the fourth and fifth mortgages are estopped from setting up usury or claiming a credit for that payment, because when the petitioner in October next succeeding the date of the assignment to him, which was in April, called on Samuel L. Abbott for payment of the interest then due on his mortgage and consequently informed him that he had become the owner of the mortgage by assignment, Abbott promised to pay the interest on the mortgage as it should become due. As the petitioner states it, what was said on the subject was as follows: The petitioner told Abbott that he had got the mortgage from Murphy.

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Abbott said that Murphy had not told him he was going to part with it, and said he supposed the petitioner would keep it, or something to that effect. The petitioner replied that he supposed might do so provided the interest was promptly paid, and Abbott said that should be done. Abbott admits that he said something to the effect also that the mortgage was a safe one. His promise to pay the interest promptly while the petitioner would continue to hold the mortgage, operates as an estoppel, so far as the interest thereafter paid was concerned; for it is to be presumed that on the faith of it the petitioner continued to hold the mortgage as otherwise he might not have done. But the estoppel does not extend to the principal, for the petitioner, when he took the assignment of his mortgage, did not do so on any representation whatever in any way of the mortgagors or any of them. When he went to see Samuel L. Abbott it was not until several months after he had got the mortgage. It is enough to say that it is obvious that Abbott was under no obligation to make any statement or give any warning as to the mortgage, the amount actually secured by it, its liability to the defence of usury or any other defence, or to speak as to its sufficiency or collectibility or otherwise. Having undertaken to pay the interest he is estopped by the promise for the reason before given, but neither he nor those claiming under him are estopped from making defence as to the principal or from claiming the application hereto of the \$100 paid for extension.

Nor does any estoppel arise from the fact that one of the mortgagors, in the assessment of taxes upon the mortgaged premises, claimed a deduction of \$1,000 as the principal of the mortgage. That was not a representation made to the petitioner, and besides it appears to have been made as late as 1876. The principle on which the amount due on the petitioner's mortgage should, under the circumstances, be computed, is to allow \$800 only of principal and all interest paid up to April 1st, 1876, from which date the interest is in arrear, and interest on \$800 thereafter at seven per cent. per annum, the rate which the bond bears, until the money be paid, deducting the interest (\$14.50) on the \$100 retained on the making of the loan, from the date of the mortgage, February

CASES IN CHANCERY.

[33 Eo ~~100~~]

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23d, 1872, to March 24th, 1874, when the \$100 note given for premium for extension fell due and was paid, and the interest (\$28.30) on \$200 from that time to the 1st of April, 1876. The petitioner is, under the circumstances, entitled to his costs of suit, including costs of his exceptions. The priority or validity of the second mortgage appears not to be disputed.

MARY ANN McKEOWN

v.

JOHN JAMES McKEOWN et al.

A resulting trust in lands claimed from the payment of the purchase-money thereof, either by the complainant alone or in common with others, will not be raised against the consideration clause of the deed, and after great delay or complainant's part except by clear proof.

Bill for relief. On final hearing on pleadings and proofs.

M. J. Lippert, for complainant.

M. J. Lippert, for John James McKeown.

W. ELLOR.

Establish a resulting trust in land in W.

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gation of the bill on which the complainant's claim rests, is, she being out at service and making good wages, and having little or no personal expenses, laid up her money for years in her mother's hands, on the understanding and agreement that when the deposit should amount to enough for the purpose, it should be employed by her mother in buying a house for her; and in pursuance of that understanding and agreement her mother purchased, for \$400, the land in question, paying for it out of the complainant's money in her hands, and afterwards, with like funds, built a two-story frame house, at a cost of \$1,000, and she moved into it; that the complainant, so soon as the building was completed, moved into it and had exclusive use of one room (she had, however, it appears, continued at service), and occupied the rest of the house in common with her father and mother; that she always, up to the time when John ejected her from the property and took exclusive possession himself, which was May 1st, 1872, supposed that the title had been taken in her name, but she then found it had been taken in his. The proof on her part consists of her testimony as to her depositing her wages with her mother for safe keeping, and verbal statements made by her mother as to the money with which the lot was purchased and the house built, and a statement made by John that he borrowed the money to build the house from his mother. The testimony as to the statements of the mother is incompetent, and if it were competent so, it would be entirely unreliable. She appears to have said, on one occasion, that the property was "between John and Mary Ann" (the complainant), that they both had money in it; and on another occasion she said that it belonged to both of them, and that their father had some money in it too. In the same conversation she claimed the property as her own. On the trial of the indictment in 1872, against John and his father for an assault and battery on Mary Ann, she swore that not a penny of Mary Ann's money was in the house, nor the money of any one else but John. Mary Ann had, on the trial, sworn that she owned the property. It would seem that both Mary Ann and her sister, Mrs. Currie (sworn for her in this cause), charged their mother with having perjured herself in that statement. The statements

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of the mother on the subject, if competent, would manifestly be of but little value. But the case shows the purchase by John of the lots in 1866, for \$400, and he swears that he paid that money with his own money; that of the \$400, \$200 were money which he had in a savings bank, and the rest was money which he had in his mother's hands, where he had placed it for safe keeping. He built the house. He swears that he paid for it entirely with his own money and money which he borrowed, but that he borrowed only \$170 of it from his mother, which he repaid to her. He exercised all acts of ownership over the property, paying taxes for it as his own, and obtaining insurance on the building as his property, and, as far as appears, his absolute right to the property was not questioned until 1872. It was then denied by the complainant, but she did not file her bill until September, 1878. The mother did not die until the summer of 1874, so that the complainant for two years or thereabouts, while her mother was living, after her claim was denied both by John and her mother, took no steps to establish her claim to the property. And it was not until four years after her mother's death and six years after her right to the property was denied that she brought her suit. Her delay may be accounted for by her ignorance and helplessness. As before stated, she was a servant, and it is quite probable that she is fairly to be regarded as *inops consilii*; and her delay is, indeed, not to be looked upon as the delay of those better aware of their rights, and the means by which they may be maintained, would be. Yet it is unfortunate for her that, for whatever reason, her application for relief was deferred until after the death of her mother. It appears, too, by the evidence of Joseph, who swears that the land was purchased and the house built by James, with his own money, that when John bought the property he showed Joseph the deed, and that the latter read it in the presence and hearing of the complainant. He swears, also, that the complainant had an account in the Greenwich Savings Bank; that he saw her bank-book and was with her when she made a deposit there, which she said was \$140, and he swears that she said it was the last of the money which John owed her, and that she had got it from her mother. John swears that he

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repaid the \$170 in several payments, the last of which was \$140. All the documentary evidence is in favor of John, and he swears and he is corroborated in material respects by Joseph) that he bought the land and built the house entirely with his own money or money which he borrowed. If any money of Mary Ann's which was not repaid, indeed, went into the property, I am unable to find clear proof of it; and it is established that when a trust is sought to be raised as a resulting trust from the payment of the purchase-money, the proof must be very clear of the payment of the purchase-money by the person in whose favor a trust by implication of law is sought to be raised; the fact must be distinctly established by satisfactory evidence. And further, that a resulting trust will not be held to arise upon payments made in common by one asserting his claim and the grantee in the deed, when the consideration is set forth in the deed (as it is in this case) as moving solely from the latter, unless satisfactory evidence is offered, exhibiting the portion which was really the property of each, and establishing the fact that the payment was made for some specific part or distinct interest in the estate. *Cutler v. Tuttle*, 4 C. E. Gr. 549. In this case, as was said in the case just cited, the testimony relied on is unsatisfactory as to the question whether any, and if so, what portion of the consideration money of the conveyance was the property of the complainant, and is too unreliable to justify the court in divesting a title evidenced by deed of conveyance, and in favor of a person whose claim is rested on the uncertain foundation of parol proof. It is true that McAtavey swears that while John was building the house, he told him that he got the money for building it from his mother, but the defendant absolutely and positively denies it. He says that the building cost him between \$900 and \$1,000; that he had to borrow some of the money to pay for it; that he borrowed \$100 of John M. Gibson and \$100 of his brother Joseph, and about \$170 from his mother, \$370 in all, and furnished the rest of the money himself. Again, the admission is, at most, that he obtained the money from his mother, not from the complainant; and, besides, it is not necessarily a confession that he obtained all of the money to build the house from that source. He admits that he borrowed

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\$170 from his mother to aid him in building, but swears that he repaid it, adding \$30 to it to cover interest. I think it is probable that money which his mother received from Mary Ann for safe keeping went into the property; but the burden of proof is on the complainant, and I cannot find such evidence of the necessary facts as would warrant a decree in her favor.

The bill will be dismissed, but without costs.

 EMMA VAN DOREN

v.

CHARLES S. DICKERSON et al.

On a sale of lands, \$500 were retained by the purchaser, out of the consideration, as an indemnity against an alleged right of dower in the premises, and a bond and mortgage thereon, given by him to the vendor to secure that amount and "lawful" interest, the principal payable only on the extinguishment of the claim. *Held*,

(1) That the mortgage could be foreclosed for arrears of interest, although the principal had not become due through the extinguishment of the alleged claim of dower.

(2) That the dower claimant could not, on this foreclosure, although made a party defendant, be required to litigate her right to dower in the premises.

Bill to foreclose. On final hearing. On pleading and stipulation as to facts.

Mr. O. Jeffery, for complainant.

Mr. F. D. Smith, for defendants Dickerson and wife.

 Van Doren v. Dickerson.

In 1869, Lee conveyed the mortgaged premises to the defendant Charles S. Dickerson. In 1880, Van Doren assigned the bond and mortgage to the complainant. When the bill was filed there was interest due and in arrear. The bill was filed not only against Dickerson and his wife, but also against Mr. and Mrs. Lindsly mentioned in the condition of the bond, the latter persons being made parties in respect to the claim of dower mentioned in the condition of the bond, and which it was designed thus to litigate in order to establish the fact in this suit that Mrs. Lindsly had no dower, contingent or otherwise, in the property. The Lindslys did not answer the bill, but Dickerson and his wife did. By the answer, the right of the complainant to a foreclosure of the mortgage is denied, on the ground that the principal of the bond is not due according to the terms of the condition; Mrs. Lindsly having never released her claim to dower in the premises. The answer, while it does not claim that there is no interest due and in arrear, insists that certain payments of interest, which have been made at the rate of seven per cent. per annum, were in excess of the amount due at the times when they were made, because the interest which the mortgage bore was only six per cent., seeing that that was the legal rate when the mortgage was given, and the mortgage calls for "lawful" interest. And they ask that an account be taken of the excess, and that it be credited on account of interest; but they offer to pay any interest which may be shown to be due and in arrear.

There can be no doubt of the right of the complainant to a foreclosure of the mortgage for arrears of interest. The interest was, by the terms of the condition of the bond, payable annually. The interest paid was up to April 1st, 1869, at the rate of six per cent. per annum. That was the legal rate at the date of the bond, and from thence up to March 15th, 1866, when it was changed to seven, and it so remained until July 4th, 1878, when it was changed to six. From April 1st, 1869, the interest paid appears to have been at the rate of seven per cent., probably by agreement, though there is no proof on that head. In the absence of any agreement to pay seven per cent., the interest would be now payable at six per cent. *Jersey City v. O'Callaghan*, 12 Vr. 349. But if there

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was an agreement to pay seven per cent. while that was the legal **rate**, the answering defendants are, of course, entitled to no credit **for** the difference in rate. *Conover v. Lewis*, 6 C. E. Gr. 230. **The** mortgage was given to secure the payment of the interest as **well** as the payment of the principal; and, though the principal **is not** due, the holder of the mortgage is entitled to foreclose **for** the interest in arrear.

Our statute (*Rev. 117 § 74*) provides that when a decree of the court of chancery shall be made for the sale of mortgaged premises (in cases where the whole sum secured by the mortgage is not due), either for non-payment of any portion or installment of the debt or demand intended to be secured by the mortgage, or the non-payment of interest due, or both, and it shall appear to the court that a part of the mortgaged premises cannot be sold to satisfy the amount due without material injury to the remaining part of the mortgaged premises, and that it is just and reasonable that the whole of the mortgaged premises should be sold together, it shall and may be lawful for the said court to decree a sale to be made of the whole of the mortgaged premises, and to apply the proceeds of the sale of said premises, or so much thereof as shall be necessary, as well to the payment of the interest, installments or portions then due, and also the costs then due and payable, as to the payment of the whole or residue of the debt or demand which hath not become due and payable, and the residue of the proceeds of such sale to be paid to the person or persons entitled to receive the same, or to be brought into court to abide the further order of the court, as the equity and circumstances of the case require; *provided, always*, that when the residue of the debt or demand intended to be secured by the said mortgage is payable at a future day without interest, and the mortgagee is willing to receive the same, the court shall deduct a rebate of legal interest for what the mortgagee shall receive on the said debt or demand, to be computed from the time of the actual payment thereof to the time such residue of the debt or demand would have become due and payable.

In such a case as this the court will see to it that the rights of the parties are secured and protected, and will give direction

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to the proceedings accordingly. *Am. L. I. & T. Co. v. Ryerson*, 2 Hb. Ch. 9; *Campbell v. McComb*, 4 Johns. Ch. 534; *Brine*
et al. v. The Farmers, 2 Johns. Ch. 486; *Lyman v. Sale*, Id. 46.
 The question as to whether Mrs. Lindsly has contingent power in the premises has not been settled by her default in this suit. She was not a proper party to the bill, and could not properly be allowed to raise the question in the suit to all the matters in controversy. *Wilkins v. Kirkbride*, 12 C. E. Gr. 2; *Am. L. I. & T. Co. v. Eagle Fire Co. v. Lent*, 6 Paige 635; *S. v. Lindsly*, 4 Johns. Ch. 331. The principal is now due and payable. The answering defendants, as before stated, have offered themselves ready to pay the interest. If they pay the interest now due in this suit, the proceedings will be stayed, and there will be an order of reference, to inquire whether a competent part of the mortgaged premises can be sold without injury to the remainder, to pay the interest and costs. In case the interest and costs are paid, or in case of sale to raise and pay the same, the complainant will be at liberty hereafter, from time to time, as the annual interest shall accrue and be unpaid, or when the principal shall become due, to go before a master of the court, on the decree in this cause, and obtain a report as to the amount then due and payable, to the end that on such report being made to this court, an order may thereupon be made for a sale of the premises (or of the residue, if a sale shall have been made of part, to raise and pay the interest now due and costs of a competent part or parts thereof to satisfy what shall be reported to be due, with the costs attending such report and sale.

Weiland v. Townsend.

CONRAD F. WEILAND

v.

NATHANIEL TOWNSEND et al.

A trustee was, by a will, clothed with extensive discretionary powers, and there was no provision for succession in the trust in case of his failure to act. He died—*Held*, that this court would execute the trust through a successor to be appointed by it, and by substituting equitable rules in the place of arbitrary power.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. Flanders, for complainant.

Mr. J. H. Rogers, for defendant N. Townsend.

THE CHANCELLOR.

This suit is brought by Conrad Weiland in his own behalf, and as guardian of his two minor children, the offspring of his deceased wife, Annie, daughter of George Wylie, deceased, late of Paterson, against Nathaniel Townsend, administrator *cum testamento annexo*, and trustee under the will of George Wylie

NOTE.—The following cases show what words have been held to confer such a trust, coupled with a power, as a court of equity could enforce after the death or removal of a trustee vested with discretionary powers:

Bartley v. Bartley, 3 Drew. 384, “at his or their entire discretion to pay rents for the benefit of one, two or more of the children of A B, the tenant for life,” with a power to appoint new trustees; but they all died without any new appointment.

Hewett v. Hewett, 2 Eden 332, power for devisees for life to cut down such timber as four trustees or the survivor “should assign, allow or direct;” and all of the trustees were dead.

Maberly v. Turton, 14 Ves. 499, a power to apply dividends for the maintenance of children, with the approbation of their parents; and none of the trustees ever acted.

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and Jane Wylie, the widow of the testator, and Georgiana and Martha Wylie, her children by him, and John F. Wylie, son by a former wife. The principal object of the suit is obtain an immediate distribution of the testator's estate appears to be all personal), which is now in the hands of Townsend, as administrator and trustee, as above mentioned, among the next of kin of the testator. The testator died on or about the 1st of June, 1867. By his will, after directing that debts be paid, he provided as follows:

"I order and direct, further, that the whole of the balance of my estate whatsoever nature and wheresoever situate, be and it is hereby placed in the hands of my executor and trustee below named, who shall be authorized and empowered and directed to carry out and complete certain business engagements in which I am now interested, to form new engagements of like nature to buy and sell property as, in his discretion and judgment, I myself might

"I further order and direct that the members of my immediate family shall be provided for by my said trustee out of my estate, each member thereof to receive an equal allowance, the amount of which shall be subject to the discretion of my said trustee; but each sum shall be at least sufficient in such to keep the recipient thereof from actual want.

"I further order and direct that the trust which I hereby create shall cease and determine at the end of twenty-one years, when the balance of estate remaining after the performance of the above conditions, shall be divided among my then legal representatives and assigns, in such proportions as to my said trustee may seem just and proper; and I do hereby

Lockwood v. Stradley, 1 Del. Ch. 298, a trust in executors and their successors "to sell lands at such time or times as they can do it to the best advantage * * * as they may think best in their discretion," and to invest and ultimately divide the proceeds; all the executors being dead.

Bull v. Bull, 8 Conn. 47, "to A and B * * * with full confidence they will * * * dispose of such residue among our brothers and their children as they shall judge shall be most in need of this to be done according to their best discretion." Both A and B died also *Gilbert v. Chapin*, 19 Conn. 350.

Martin v. Barnard, 55 Ga. 520, in trust for testator's daughters, that my said executors may allow to the husbands of my daughters the general proceeds of their shares, if they think it prudent to do so, or turned over one daughter's share to her husband, who afterwards died.

City of Portsmouth v. Shackford, 46 N. H. 443, "to dispose of, for the benefit of my brothers and sisters, as he [the trustee] might from time to time see fit, as I would have done, if I could have foreseen the circumstances."

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ower him to make such division according to his best discretion and judgment; and, in making such disposition of my estate, I am governed by conclusions which are the result of long and careful reflection.

“ And I do hereby appoint as such trustee, and also as executor of this will, Francis A. Canfield, in full confidence that its provisions will be faithfully executed.”

The will was proved in Passaic county, and letters testamentary thereon issued to Francis A. Canfield, on or about the 15th of June, 1867. He died in 1876, and the defendant Nathaniel Townsend was appointed by the orphans court of that county, in that year, administrator *cum testamento annexo*, and trustee in his place. He was required to give bonds in the sum of \$62,000, which he gave accordingly. The debts have all been paid, and all the duties to be discharged by Townsend in regard to the estate are those of a trustee.

The complainant insists that the will gave Canfield only a mere power, and that the power, being a discretionary one, expired with him; and that the residue of the estate is therefore immediately divisible among the next of kin of the testator. But it is clear that Canfield was clothed with more than a mere power. He was clothed with a trust. The testator declares that he places the residue of his estate *in trust* in the hands of his executor and trustee, and he subsequently speaks of the provision as the *trust* which, by the will, he has created. He authorizes the trustee to

Davis v. Christian, 15 Gratt. 11, a testator conferring a power to sell lands in order to carry on a partnership, gives therewith a power which, although discretionary, survives.

Faulker v. Davis, 18 Gratt. 651, lands were conveyed to trustees in trust for N. and his wife, and the survivor of them for life, and then to their children, and if N. should think it expedient to sell the lots, then to carry out the sale and invest the proceeds on the same trusts. N. dies, and the court may execute the trust to sell.

Chase v. Davis, 65 Me. 102, “two-fifths for J. C. and S. C. in trust for S. and his wife, and if, after five years from my decease, they shall, in the exercise of their best judgment, consider it for the best interest and happiness of S. and his wife, to transfer to them said two-fifths, they are hereby authorized to execute such transfer.” J. C. and S. C. duly qualified as executors and trustees, and S. C. died.

Wilson v. Pennock, 27 Pa. St. 238, “If he [the trustee] shall think it expedient, and the said M. shall assent thereto;” and the trustee died.

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buy and sell property at his full discretion, and in terms gives him full power to divide the balance of the estate which may remain at the expiration of the time limited for the duration of the trust, among the testator's then legal representatives and their assigns in such proportions as to the trustee may seem just and proper, expressly and explicitly empowering him to make the division according to his discretion and judgment. The title to the estate was by the will vested in the trustee. Apart from the testator's declaration that he placed the estate in the trustee's hands in trust, denominating and characterizing the deposit as a trust and the depositary as a trustee, it was necessary for the execution of the ample power, and the exercise of the wide discretion given to the trustee by the will, that he should have the title. The distinction between a naked power and a trust has been said to be generally something like this: that a naked power is a mere authority over any subject matter, enabling the donee to control its disposition without vesting the thing itself, or any interest in it, in him; a trust, on the other hand, is where the thing or an interest in it is vested in the donee, upon the confidence that he will make a certain disposition of it. *Withers v. Yeaden*, 1 Rich. Eq. 324. The discretionary power given by the will to the trustee was coupled with a trust for the benefit of the testator's family. Such a power this court will itself execute according to equity, where the trustee dies before executi

Hinklin v. Hamilton, 3 Humph. 562, a successor to an executor who failed to apply to the court to obtain the state's consent to the manumission of a slave, may be appointed after such executor's death, and required so to apply.

Baillie v. McWorter, 56 Ga. 183, on the appropriation of trust funds to satisfy a creditor of the *cestui que trust*, the court appointed a receiver, the trustee having died.

Mosby v. Mosby, 9 Gratt. 584, "whenever my executors think best, they shall sell my land in B." One executor died and one had been removed.

In the following instances the courts have refused to interfere:

Hibbard v. Lambe, Amb. 309, "the residue to be disposed of in charity to such persons, and in such manner as my executors, or the survivor of them, shall think fit." Two of them having died, and a third being very infirm, application was made to the court to have other trustees added.

Cole v. Wade, 16 Ves. 27, "for such of my relations and kindred as they [the executors], in their discretion, shall think proper." Both executors died, the

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OR refuses to execute it, or if, from any circumstance, the execution of the power by him becomes impracticable. *Perry on Trusts* § 249. Such a trust as that created by the will—a trust to take in hand and manage an estate at the trustee's full discretion, to make allowances almost entirely at his discretion to the testator's family, and at the termination of the trust to divide the estate among the testator's heirs or next of kin, or their assigns, in such proportions as to him may seem just and proper, acting in the matter according to his own discretion—cannot, for obvious reasons, be delegated, unless the creator of the trust himself has so provided. Where a testator gave his property to his son in trust to apply the income to the use of himself and family, and to give by deed or will all beyond what he should so apply, unto himself or any child or children of his own, in such proportions and in such manner as he should see fit, and the son died, having devised the property to his wife, with directions to his executors to act under the will of his father, it was held to be a trust coupled with a power to appoint at his son's discretion among his children; that the power could not be delegated; that the son's will was not an execution of the power, and that his children took equally under their grandfather's will. *Withers v. Teaden, ubi sup.* See also the cases cited in *Perry on Trusts* 251. And it is laid down as a general rule that where a power

SURVIVOR devising his interest in testator's estate to B. Neither B, nor a trustee designated by the court, could execute it.

Down v. Worrall, 1 Myl. & K. 561, to executors "to apply the same as I [testator] shall appoint, and in default of appointment as to any part, to settle each part at their discretion, either for pious and charitable purposes, or otherwise, for the benefit of my sister and her children;" not executable by the representative of the surviving trustee.

Newman v. Warner, 1 Sim. (N. S.) 457, "for W. and C. and the survivor of them and the executors and administrators of such survivor, at the request and in the direction of A and B," to preserve contingent remainders. Afterwards C died and W. was resident abroad.

Robson v. Flyght, 4 De G. J. & S. 608, a power to lease lands, vested in two trustees and their survivor and his representatives, where one trustee died and the other disclaimed, was considered as not cast on the heir-at-law of the testator. See *Garfoot v. Garfoot*, 2 Johns. Ch. 21.

Belote v. White, 2 Head 703, to three trustees, with power in them or their

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is given to trustees, the exercise of which is arbitrary, and ~~the~~ settlement contains no proviso for the appointment of new ~~trust~~ trustees with similar powers, it is not competent for the court, on the substitution of new trustees by its own inherent jurisdiction, to invest such trustees with that arbitrary power. *Levin on Trusts* 449. But the court will not suffer the trust to fail for want of a trustee, and it will therefore appoint a successor, substituting equitable rules in the place of arbitrary power. In the case under consideration the new trustee does not, according to his answer, claim the right to exercise the arbitrary power given by the will to the trustee thereby appointed. He declares that the only control he has ever exercised over the estate has been for the purpose of preserving the trust funds and property, and executing the trust for the benefit of the testator's immediate family; that he never has assumed to himself the discretionary powers granted to Canfield by the will, nor has he ever assumed to exercise the same control over the property of the estate which came into his hands as the testator could (in the language of the will) have exercised if living, nor to complete any business arrangement entered into either by Canfield or the testator; and he adds that he knows of no business engagements or arrangements to be carried out. He further says that he has not claimed, and does not claim, the right to buy and sell prop-

survivor, to sell and convey any part or all of the property, for the use of testator's daughter and her children, to vest and revest the proceeds, and to manage the whole in any way they might think promotive of the interests of the beneficiaries.

Bailey v. Burges, 10 R. I. 422, "to B, his heirs and assigns, upon further trust from time to time, as and when the said B shall deem it expedient to sell or mortgage the whole or any part * * * at his discretion." B was removed by the court from the trust, on his own application.

Littleton v. Addington, 59 Mo. 275, a widow and another were empowered to sell lands "as they might deem best for the interests of the estate, and to use the proceeds with like discretion." The widow, after ceasing to act as executrix, has no power to sell.

Riddle v. Cutler, 49 Iowa 547, interference with a trust was refused, where a spendthrift had conveyed his property to a temporary trustee until a permanent one could be selected, and the former was dead and the latter not chosen.

Such power cannot be exercised, ordinarily, by an administrator *cum testa-*

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on account of the estate, nor the right to enter into new business engagements, except under the advice of court. He admits, made allowances to the members of the immediate family of the testator (but always, as he alleges, only out of the income of the estate, and having regard to the amount of the income and the rank and condition in life of the family), he claims the right to make such allowances. He appears to have taken the advice and direction of the Passaic orphans' court in reference to the propriety of making allowance to the plaintiff and John F. Wylie, and was advised by that court to make no allowance to the former, but to make one to the latter.

The amount of the annual allowance to be made to the members of the testator's immediate family is, by the will, subject to the discretion of the trustee, with proviso that the allowance shall be at least sufficient to keep the recipients thereof from actual want. This discretion is one which the new trustee cannot exercise; but the amount of the allowances must be fixed by this court.

The testator clearly intended that the trust which he created by his will should last for twenty-one years. He makes no other provision for his widow than that contained in the trust—allowance to be made by the trustee for her support, and the

to annexo. *Brush v. Young*, 4 Dutch. 237; *Ross v. Barclay*, 18 Pa. St. 179; *Walter v. Clark*, 13 Metc. 220; *Abell v. Howe*, 43 Vt. 403; *Belcher v. Branch*, R. I. 226; *Knight v. Loomis*, 30 Me. 204; *Att'y-Gen. v. Garrison*, 101 Mass. 1; 1 Wms. on Exrs. 654, note (w¹); *Dominic v. Michael*, 4 Sandf. 374; *Ferre v. Proctor*, 2 Dev. & Bat. 439; *Armstrong v. Park*, 9 Humph. 195; *Besant's Estate*, 18 Wis. 451; *Wooldridge v. Watkins*, 3 Bibb 349; *Turver v. Haines*, Ala. 503; *Muldrow v. Fox*, 2 Dana 74; *Coleman v. McKinney*, 3 J. J. Marsh. 1; *Lockwood v. Stradley*, 1 Del. Ch. 298; *Greenough v. Welles*, 10 Cush.

CONTRA: *Brown v. Armistead*, 6 Rand. 594; *Mosby v. Mosby*, 9 Gratt. 584; *Walter v. Hester*, 2 Ired. Eq. 330; *Mathews v. Meek*, 23 Ohio St. 272; *Elstner v. Hester*, 32 Ohio St. 358; *Bain v. Matteson*, 54 N. Y. 663; *Evans v. Chew*, 71 N. Y. St. 47; *Harrison v. Henderson*, 7 Heisk. 315; *Anderson v. McGowan*, 45 Ala. 462; S. C., 42 Ala. 280.

B.—*Conklin v. Egerton*, 21 Wend. 430; 25 Wend. 224, doubted in *Elstner v. Hester*, 32 Ohio St. 371; *Anderson's Estate*, 5 N. Y. Leg. Obs. 305; and *Withers v. Darden*, 1 Rich. Eq. 325, qualified in *Lines v. Darden*, 5 Fla. 79.

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distribution to be made at the end of twenty-one years from ~~m~~ his death. His language is :

"I further order and direct that the trust which I hereby create shall ~~cease~~ and determine at the end of twenty-one years, *when* the balance of any ~~estate~~ remaining after the performance of the above conditions shall be ~~div~~ided among my *then* legal representatives and assigns."

His intention was that the estate should be held and managed by the trustee for the period which he designates as the duration of the trust ; his immediate family to be supported out of it in the meantime, and that it should then be justly and equitably divided among those who would at that time, by law, be entitled to it, either as his heirs or next of kin, according as the property should be real or personal ; and he confided the division to the trustee because the latter, from his administration of the estate in the meantime, making the allowances, &c., would be able to make the distribution according to justice. The distribution, now that the trustee whom he appointed is dead, must be made by this court. In the meantime, and until the time for distribution arrives, the estate will be managed under the direction of

As to an administrator *de bonis non*, see *Hull v. Hull*, 24 N. Y. 647 ; *Hepburn's Estate*, 8 Phila. 206 ; *Bell v. Humphrey*, 8 W. Va. 1 ; *Meredith's Estate*, 1 Pars. 433. And an administrator *durante minore ætate*. *Monsell v. Armstrong*, 9 L. R. (14 Eq.) 423. And an administrator or trustee authorized by special act of the legislature. *Corbell v. Zeluff*, 12 Gratt. 226 ; *Tindal v. Drake*, 60 Ala. 170 ; *McComb v. Gilkey*, 29 Miss. 146 ; *Lothrop v. Stedman*, 42 Conn. 523.

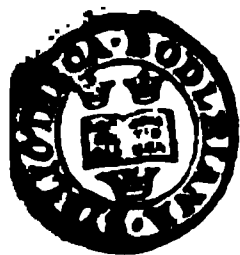
The court of chancery may appoint a trustee where such power is conferred by testator on either one of two other courts, and they neglect to exercise it. *Griffith v. State*, 2 Del. Ch. 421.

Whether the survivor of two or more trustees can exercise a discretionary power of sale given to all, see *Clinefelter v. Ayres*, 16 Ill. 329 ; *Bartlett v. Sutherland*, 24 Miss. 395 ; *Mallet v. Smith*, 6 Rich. Eq. 12 ; *Clark v. Horn*, 47 Miss. 434 ; *Evans v. Chew*, 71 Pa. St. 47 ; *Phillips v. Stewart*, 59 Mo. 471 ; *Parker v. Sears*, 117 Mass. 513 ; *Davis v. Christian*, 15 Gratt. 11 ; *Hamilton v. Love*, 2 Kerr 243 ; *Marks v. Tarrer*, 59 Ala. 335 ; *Saunders v. Schmaelzle*, 49 Cal. 59 ; *Niles v. Stevens*, 4 Denio 399 ; *Taylor v. Morris*, 1 N. Y. 341 ; *Chard v. Villeponteaux*, 3 McCord 19 ; *Miller v. Meetch*, 8 Pa. St. 417 ; *Bell v. Humphrey*, 8 W. Va. 1. Or the executor of an executor, *Chambers v. Tulane*, 1 Stock. 146.

See, further, 8 Am. Law Rev. 669 ; 2 Wms. on Exrs. 951 ; 2 White & Tud. Lead. Cas. in Eq. 1833.—REP.

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court. There will be a reference to a master as to the amount and character of the estate; in what investment it stands; the character of those investments; what is the annual income derived therefrom, and in what payments it is received; the fitness of the present trustee, and whether he should give bonds, and if so, to what amount, if he be favorably reported upon; and who now constitute the testator's immediate family, and what allowance ought to be made to each one for his proper support.



BETHIAH THOMPSON

v.

NATHAN H. THORP et al.

Under the charter of the city of Rahway, adopted in 1865, the lien of the city for ordinary municipal taxes and for assessments for street improvements, has priority prior to a *bona fide* mortgage on the premises made and registered before the levy or assessment.

Bill to foreclose. Question submitted on briefs. On stipulation of counsel as to facts.

Messrs. Shafer & Durand, for complainant.

Mr. L. Lupton, for city of Rahway.

THE CHANCELLOR.

By a stipulation made by the respective counsel of the complainant and the city of Rahway, it is agreed that the whole of the principal of the complainant's mortgage is due, with large arrears of interest; that the mortgaged premises are the same on which the taxes and the assessment for benefits for the widening Main street in Rahway, also mentioned in the pleadings, were

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assessed; that that assessment and the taxes were assessed after the complainant's mortgage was recorded; that the taxes were assessed against the mortgagor, as owner of the property; that the property is the same which was sold for non-payment of the taxes of 1876; that no notice was given to the complainant by the city of the non-payment of the taxes; that the assessments, as well that for widening as those for taxes, were duly and legally made, and that the sale of the property for taxes was also legally made, and that the assessment still remains unpaid.

The question presented for decision is, whether, under the charter of the city of Rahway, taxes (which were the usual ones for city, county and state purposes), and the assessment for widening Main street, all of which were assessed on the property subsequently to the date and recording of the complainant's mortgage, are liens prior to that of the mortgage. The mortgage was made and registered in May, 1870. The taxes in question were assessed for the years 1876 and 1877, and the assessment for widening, in September, 1870. By the charter, which was passed in 1865 (*P. L. of 1865 p. 499 § 57*), it is provided that all taxes and assessments which shall be assessed or made upon any lands or real estate in the city, shall be and remain a lien thereon until paid, for the amount of such taxes or assessments, with interest thereon at the rate of twelve per cent. per annum, and all costs and fees; and that such lien shall remain upon such lands and real estate, notwithstanding any devise, descent, alienation, mortgage or other encumbrance thereof, and notwithstanding any mistake in the name of the owner or owners, or omission to name the owner or owners of such lands and real estate; and that any assessment of taxes, in which such mistake or omission occurs, shall be valid and effectual in law, and if unpaid shall be returned in the list of delinquent taxes; and such lands and real estate shall be proceeded against, and sold in the manner provided by the act. By a supplement to the charter (*P. L. of 1874 p. 475*), it is provided that the lien of taxes shall begin from and after the day on which the taxes are declared to be due and payable, which is fixed by the charter as on the 15th of October. Though the taxes in question

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be not assessed until after the registering of the mortgage, yet under the provision of the 57th section of the charter, the lien of the former, though subsequent in date, is paramount to that of the mortgage. *Trustees of Public Schools v. City of Trenton*, 100 N.J. Eq. 667, 674, 675. In that case the charter declared that the tax should be a lien for two years from the date of the tax warrant, notwithstanding any devise, &c., and it also contained a provision that the certificate of sale should constitute a lien on the premises sold, after it should have been recorded. The provision, that the certificate of sale shall constitute a lien on the premises sold, after it shall have been recorded, is found in the charter of Rahway, and it is, in the brief of the complainant's counsel in this case, stated to be the only provision making a lien on real estate so as to affect the rights of prior mortgagees. But by the construction which, under the authority of the case just cited, is to be given to the 57th section, that is manifestly an error.

The charter, by the 83d section, makes the assessments for benefits in opening or widening streets &c., a lien on the land and real estate assessed, from the time when the improvements shall have been made. By the 86th section, it is declared that every such assessment shall be payable with interest thereon from the time when it is ratified by the common council until it is paid, and that the interest shall be deemed and held, to all intents and purposes, to be a part of the assessment, and, as such, a lien upon the lands and real estate in respect whereof the assessment is made. By the 89th section, it is provided that the common council may direct the city treasurer to collect the assessments by public sale at auction, of the lands and real estate whereon they have been imposed or are a lien. The 90th section requires the treasurer to make a transcript and give notice. The 91st section makes it his duty to sell and deliver a certificate of sale, and adds that all further proceedings which are authorized by the act in respect to the sale and redemption of lands or real estate for the non-payment of taxes, may in like manner be had in the case of sales of lands or real estate for the non-payment of assessments, where such assessments are made a lien on lands and

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real estate by the provisions of the act. The 65th section provides that no mortgagee whose mortgage shall have been duly recorded before sale for any tax or assessment, shall be divested of his rights in the property sold, unless six months' notice, in writing, of such sale, shall have been given to him by the purchaser, or by any person or persons claiming under him &c. The next, the 66th section, provides that the owner, mortgagee, occupant, or any person or persons having a legal or equitable interest in any lands and real estate sold for taxes or for any assessment under the provisions of the act, may redeem in two years from the sale, and if the person redeeming be a judgment creditor or mortgagee, he shall have a lien on the property for the amount paid by him, with interest at seven per cent. per annum, as if included in his judgment or mortgage, and may enforce payment thereof in the usual manner. By the 67th section, it is declared that if there be no redemption within the time limited, a declaration of sale shall be given, by virtue of which the purchaser or purchasers, and his and their legal representatives, shall lawfully hold and enjoy the lands and real estate sold, with the rents, issues and profits thereof, for his and their own proper use, against the owner or owners thereof, and all persons claiming under him or them, until the term for which the purchaser may have agreed to take the property shall be ended. It will have been seen that the provision of the 57th section of the charter, giving priority of lien, applies, by its express terms, to assessments for benefits, as well as to taxes. It is clear that that provision is, on the authority of the case before cited, conclusive on the question submitted, both as to the taxes and the assessments for widening. In *City of Paterson v. O'Neil*, 5 Stew. Eq. 386, the provision for redemption by the mortgagee &c., was regarded as an important element in determining whether the charter of the city disclosed an intention on the part of the legislature to postpone the lien of a mortgage to the lien of taxes subsequently assessed. That charter contained no provision for priority, such as that contained in the 57th section of the charter under consideration; nor did it provide that notice to the mortgagee should be necessary before his title could be divested. But

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The court considered the fact that there was a provision that the land should be assessed for its full and fair value, and that mortgages on the land should not be taxed in the hands of any person in this state, and a provision that the assessment should be valid notwithstanding any error or omission in naming the owner, and the provision for redemption, evincive of an intention on the part of the legislature to make the lien of the tax paramount to that of the mortgage. The intention of the legislature in the case in hand, to put municipal assessments for benefits on the same footing as to liens as taxes, is manifest, and the necessity of doing so as a matter of policy is obvious.

The city is entitled to priority for the taxes and assessment.

RANSOM BENTLEY

v.

FERDINAND HEINTZE et al.

A judgment creditor may set aside a sheriff's sale of mortgaged premises when the mortgage was fraudulently given by the judgment debtor to protect his property, for an amount greater than he owed, and the creditor was deterred from bidding at the sale, which was under prior judgments, by the fact that the amount of the fraudulent mortgage, with those judgments, amounted to more than the value of the premises.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. C. H. Hartshorne, for complainant.

Mr. C. L. Corbin, for Mr. Wanner.

Mr. E. D. Deacon, for Heintze.

THE CHANCELLOR.

The bill is filed by Ransom Bentley, a judgment creditor of

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the defendant John J. Wanner, to reach, for the satisfaction his judgment, certain land in Jersey City, which, on the 12 of January, 1877, was owned by Wanner, and was then sold the sheriff of Hudson county under two executions against goods and lands. One of the executions was issued on a judgment the supreme court recovered July 8th, 1876, by Aaron Hirsch and others against Wanner, for \$316.29; the other, on a judgment recovered in the Hudson circuit court, September 12 1876, by Nicholas B. Cushing against Wanner, for \$448. The complainant's judgment was recovered against Wanner the supreme court, September 9th, 1876, for \$6,000 (penalty real debt, \$3,187.25). A writ of *feri facias de bonis et tenementis* was issued thereon on the 14th of that month, and levied on the property the next day. The levies under both the other judgments were prior to that of the complainant. When the sale was made there was on the property a mortgage given by Wanner and his wife to the defendant Heintze, August 18th 1876, and recorded on the 21st of that month, purporting to have been given to secure the payment of \$7,000 in five years, with interest half-yearly. The property was struck off and sold at the sheriff's sale to Solomon Childs, one of the plaintiffs in the Hirsch judgment, for \$550, and he, pursuant to an understanding had at the sale between him and Heintze, transferred his bid to the latter, who paid the money and took the sheriff's deed for the property to himself accordingly. After payment of the Hirsch judgment, there was left a balance of \$174.23, which Heintze obtained on account of his mortgage on application to the supreme court; his mortgage being subsequent in date to the Hirsch judgment, but prior in date as to registry to the other judgments.

The complainant did not, in person or by attorney, attend the sale. His attorney testifies that he intended to attend and bid upon the property for the complainant, but abandoned the intention on learning, from a search of the records, of the existence of Heintze's mortgage, the amount of which, and the Hirsch and Cushing judgments, was more than the value of the property. Heintze subsequently, by deed of August 23d, 1879, con-

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eyed the property to Wanner's wife, subject to the payment of taxes assessed after the year 1876, and water rents which became due before 1875.

The consideration of that deed was \$4,000, no part of which was paid, but it was secured by a mortgage from Mrs. Wanner and her husband to Heintze on the property for that sum, payable in three years, with interest. At the time of the delivery of these papers, a lease of the property was given to Heintze for three years, at a rent of \$800 a year, payable monthly in advance. The consideration of the deed was made up of the money which was due to Heintze from Wanner when the first-mentioned mortgage was made, and the payment of which that mortgage was given to secure; the money paid for the property at the sheriff's sale, taxes and insurance premium paid on the property by Heintze; money paid by Heintze for, or on account of, repairs to the premises, and the amount of a judgment recovered against Wanner, in the Hudson circuit court, by William M. Fleiss and Benjamin W. Allen, May 26th, 1877, for \$797.09 (subsequent to the before-mentioned judgment, all of which were recovered in 1876), which Heintze had purchased (at fifty cents on the dollar) at Wanner's request, and of which he held an assignment, and interest on all those moneys, besides expenses of searches, conveyancing, &c. When the mortgage of \$7,000 was given, there was due to Heintze from Wanner only the sum of \$502.21, for so much money paid by Heintze, March 25th, 1876, to take up a note given by Wanner to David Ettling, and endorsed by Heintze, and protested for non-payment, and \$750 lent by Heintze to Wanner, August 1st, 1876, together about \$1,250, besides some interest thereon. How it came that a mortgage for \$7,000 was given, Heintze explains as follows: He says that a short time before the mortgage was given, Wanner applied to him to lend him more money, and he refused to do so until after he should have been secured for the money he had already lent him (he says Wanner was then getting worse financially every year), and Wanner told him he would secure him by giving him a mortgage on the house for \$7,000, and asked him if that would satisfy him, and Heintze replied that it would. Wanner subse-

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quently got the mortgage drawn, and he and his wife executed it, and Wanner brought and delivered it to Heintze. Wanner, according to Heintze, gave him a chattel mortgage also for the same debt, at or about the same time, but, according to Wanner, the chattel mortgage was given previously, to secure the loan of \$750. It appears to have been a subsisting and valid security for the money. When the real estate mortgage was given, it was understood between them that Heintze was not to renew the chattel mortgage at the end of the year. They say it was understood that on the credit of the mortgage of the house and Heintze was to lend Wanner the money to pay debts (some of which were pressing) for repairs which had been done to the house (Heintze occupied it for a restaurant and saloon, as testified by Wanner) and taxes on the property, and to secure to Heintze payment for repairs which he might make (and which Wanner expected him to make), and advances of money to Wanner from time to time. He seems, however, to have advanced very little, if any, and up to the time of the sheriff's sale, had advanced none. The property was sold the following January. Heintze states that he was not aware of the fact that it was advertised to be sold until the day of the last adjournment, when, he says, he was informed by the sheriff that the sale had been adjourned a week. He attended the sale. Wanner and his counsel were there, and so was Mr. Childs, the judgment creditor before mentioned. Before the property was put up for sale, Heintze agreed with Wanner's counsel (to use Heintze's own language), that he would buy the property himself at the sale, or get it of whoever should buy it, and sell it to Wanner's wife. Heintze bid \$500, and Mr. Childs \$550, and the property was knocked down to the latter. There was an understanding, however, between Childs (who Heintze says was a friend of his) and Heintze, that the latter was to have it, and therefore Heintze did not bid against Childs's bid of \$550.

All the testimony on the subject tends directly to the conclusion that the property was bought in by Heintze for Wanner. Heintze says that Wanner wanted him to buy the property

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suggested to him that he should buy it and sell it to Wanner's wife, because he, Wanner, could not hold it himself.

As before stated, the supreme court, on application of Heintze, ordered that the surplus money, after paying the Hirsch judgment, should be paid over to Heintze on his mortgage. He did not, in fact, receive it, but it was paid over to Wanner by Heintze's direction. Mr. Collins, who was acting for Wanner, and also for Heintze, in obtaining the surplus money, says, on that subject, that he understood that Wanner was in want of money, and begged Heintze to let him have it, and Heintze did so. Notwithstanding their denial, the evidence leads to the conviction that the \$7,000 mortgage was intended by both Heintze and Wanner to cover up the property from the creditors of the latter. Heintze says he knew that Wanner was laboring under pecuniary embarrassment; and he also says that he was a friend of his, and he wanted to see him get along. For the \$750 Heintze had, as before mentioned, security in a chattel mortgage, and it is not pretended that it was not adequate. Heintze's statement as to how it happened that the \$7,000 mortgage was made for so much, when the actual debt was only about \$1,300, has already been given. Wanner's is as follows: To the question,

"If you gave him a chattel mortgage on your goods for \$750, why did you include that \$750 in your \$7,000 mortgage?"

he answers :

"That is right, that is included in the \$7,000 mortgage; I gave him the \$7,000 mortgage; he would not lend me any more money, and then I gave him the \$7,000 mortgage to make all his claim good, and if I got in want or trouble, he would help me with more money; on that ground I gave it to him; he was the only friend to help me when I was moneyless, and that is the reason I gave him that mortgage, to secure him and to make sure that he would get his money back."

When asked how he came to give Heintze a mortgage for so much, he answers that Heintze desired to have the mortgage for a larger sum than he owed him, so as to make him secure. In the beginning of August, 1876, the firm of William M. Fleiss

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& Co., of New York, sold goods to Wanner on credit. To obtain the credit, Wanner stated to Mr. Fleiss, in substance, that he owned real estate in Hudson county of the value of about \$50,000, and alleged that it was unencumbered. About a month afterwards, Mr. Fleiss having learned that he had given the two mortgages, the chattel mortgage and the \$7,000 mortgage (which Fleiss then understood that the latter was for only \$1,700), spoke for him and asked an explanation. Wanner then told him that his object in giving the mortgages was to protect himself against some suits which had been (or might be) brought against him as endorser, in case judgment should be recovered against him; and he gave as his excuse for his action that he did not feel bound to pay the money for the recovery whereof the suits were brought. Mr. Fleiss having ascertained from the record that the real estate mortgage was for \$7,000, instead of \$1,700, spoke to Heintze on the subject, and asked him about the mortgage; but Heintze would say nothing more than he had given value for it. Again, at the sheriff's sale, nothing whatever was said in regard to the mortgage; no mention was made of it nor any reference to it. Indeed, it appears that Mr. Collins, Wanner's counsel, did not know of its existence until his firm was employed by Heintze to obtain the surplus money. Heintze admits that he has paid it ever since the sheriff's sale. It appears that he has paid it to Wanner. It is receipted for by Wanner in his own name alone up to September, 1879 (the bill was filed in January following) and since that he appears to have receipted for it in the name of both his wife and himself.

It appears by the evidence that the size and character of the mortgage, the fact that it was a mortgage purporting to secure not past debts and future advances, but a debt of \$7,000 at interest, prevented the complainant's attorney from bidding the property for his client, at the sheriff's sale, by inducing him to believe that it was useless to attend the sale at all. After Hirsch judgment, came, according to the records, the mortgage for \$7,000. Next came the Cushing judgment, and then the complainant's. The complainant's attorney swears that his reason for not attending the sale was, that he knew the en

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brance of the Heintze mortgage was more than the value of the property. He valued the premises at between \$6,000 and \$7,000. He further says that had it not been for that mortgage, he would have bid enough to have secured at least a part of his client's debt. There were due on the Hirsch judgment, \$375.77; on the \$7,000 mortgage, only about \$1,300, and on the Cushing judgment about \$460, altogether about \$2,135; and these were all the encumbrances ahead of the complainant's judgment. The apparent amount, however, owing to the delusive character of the complainant's mortgage, was about \$7,800. It is urged that there was a cloud upon the title at the time, which was subsequently removed; but it is very evident that it did not, in fact, affect the price of the property at the sheriff's sale; and, besides, the property, which brought only \$550, rented then for \$800 a year, and has rented for that sum ever since. After Heintze purchased the property, he, at the request of Wanner, bought the Fleiss judgment. He paid for it, as before stated, only fifty cents on the dollar, but he insisted on receiving security by the \$4,000 mortgage, for the whole amount due on the judgment. Thus, it may be remarked, if the transaction under consideration is allowed to stand, the Fleiss judgment is paid by Wanner out of the property by means of the shift of the title, to the exclusion of the Cushing judgment and that of the complainant, both of which are older, and under both of which the property was levied upon in 1876, while the Fleiss judgment was not recovered until 1877, after the sheriff's sale. The Fleiss suit was commenced by *capias ad respondendum* ordered on proof of fraud in the contracting of the debt. It appears that the complainant's attorney did not learn of the conveyance from Heintze to Wanner's wife, until a short time before the bill was filed. The complainant resides in Saratoga county, New York.

The sheriff's sale and the deeds to Heintze and Mrs. Wanner, and the mortgage for \$4,000, will all be set aside. There will be an account to ascertain the amount justly due to Heintze on the \$7,000 mortgage at the time of the sheriff's sale, with interest thereon since that time, and also the rest of the amount due him under his mortgage, as between him and Wanner, and of the

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amount due on the Hirsch judgment (including execution fees), with interest from the same period. Also the amount due on the Cushing judgment and the complainant's judgment, with interest from the same time. The property will be resold, and out of the net proceeds of the sale, the costs of this suit will first be paid. Heintze will then be paid the amount found due in the account on the Hirsch judgment, and the amount due on his mortgage at the time of the sheriff's sale, with interest on both; thirdly, the Cushing judgment will be paid; fourthly, the complainant's judgment; fifthly, the amount which, as between Heintze and Wanner, but not as between Heintze and the complainant and Cushing, remains due the former under the mortgage; and if there be any surplus, it is to be paid to Mrs. Wanner.

FREDERICK BOHDE et al., executors,

v.

PATRICK LAWLESS et al.

It is no objection to a petitioner's right to set aside a voluntary conveyance of lands, made to defeat a personal decree for deficiency on a foreclosure, that at such foreclosure sale the mortgaged premises were bought by the petitioner (the mortgagee) at much less than their actual value, where no fraudulent or inequitable conduct on the petitioner's part is shown.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. J. C. Besson, for complainants.

Mr. J. Chapman, for Margaret Lawless.

THE CHANCELLOR.

The defendant Patrick Lawless, in 1873, gave his bond of that date, to Peter Lawless, conditioned for the payment of

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\$5,000 in five years, with interest. The payment of it was secured by a mortgage, on real estate in Hoboken, given by Patrick and his wife to Peter. In 1874, Peter assigned the bond and mortgage to the complainants, executors of Claus Dorcher, deceased. They obtained a decree of this court for foreclosure and sale upon the mortgage, May 24th, 1879, with a personal decree for deficiency against Patrick Lawless. The mortgaged premises were sold, under the execution issued on the decree, to the complainants for \$500, leaving a deficiency of over \$5,000. By an order of this court, a writ of *fieri facias de bonis et terris* was issued against Patrick Lawless to the sheriff of Hudson, where he lived. It was returned *nulla bona aut tementa*, and the bill in this cause was then filed. In October, 1879, Patrick Lawless, by his deed, conveyed to Vincent F. Flanagan certain other land in Hoboken which he then owned, and Flanagan, on the same day, conveyed the property to Patrick's wife. The bill is filed to subject that property to the payment of the complainant's debt, the deficiency before mentioned. It asks an answer without oath.

The answer gives the following statement of the consideration of the conveyance to Lawless's wife from her husband through Flanagan:

"That Patrick, having been sick for a number of years and unable to provide for the family, consisting of himself, his wife and five children, his wife had worked, and by means of her labor and from moneys borrowed from her friends, had been able to accumulate some moneys, which she had given to him, and that this property was conveyed to her for a good consideration, in order that she might be secured to herself and her friends for the moneys advanced, and that a home might be retained for the family."

Lawless, who is the only witness sworn on the subject, says that he had the deeds for the property made to his wife and the title put in her name because he owed her money which she had furnished him when he was sick; that he had been sick during a period of from seven to nine years, and during the time of his sickness his wife provided for him, and did all she could for him; that he made the conveyance (which he says was made after

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he knew the foreclosure had been begun) to compensate his ~~w~~ *w*ife for money she had given him when he was not able to be around; that his wife lent him money from time to time—\$80 at ~~one~~ time and \$64 at another; that the latter loan was made, ~~he~~ thinks, in 1879; that she got the money by earning it; that ~~she~~ used to take care of her brother's property, and he paid her ~~for~~ it; that he has no memoranda of the moneys furnished him ~~by~~ her, nor did he ever give her any note; that he asked her ~~for~~ the money when he was "short," and she let him have it; ~~and~~ that the \$64 above mentioned were the last he got from her. ~~It~~ is quite clear that the conveyances should be set aside as against the complainants' debt. See *Post v. Stiger*, 2 *Stew. Eq.* 544; *Clark v. Rosenkrans*, 4 *Stew. Eq.* 665. They were evidently voluntary, and are therefore not valid as against the debt which then existed. The bill avers that the property was worth about \$2,000. The answer is silent on that point, and there is ~~no~~ evidence on the subject.

On the hearing it was insisted that the fact that the complainants were the purchasers of the mortgaged premises at the sale under the foreclosure, for \$500, while the property was and is worth a large sum beyond that amount (perhaps enough to cover the entire amount of the deficiency), is of itself enough to induce this court to refuse to aid the complainants in enforcing payment of the deficiency. But it is quite evident that that consideration cannot avail the defendants. The complainants are before the court seeking payment of a lawful demand, and they have been guilty of no fraudulent or inequitable conduct to debar them from the aid of equity. There will be a decree for the complainants

Lydecker v. Palisade Land Co.

MARIA D. LYDECKER

v.

THE PALISADE LAND COMPANY et al.

The provision of the act of 1879 (*P. L. of 1879 p. 340*) that taxes thereafter ~~assessed~~ should be a lien on the premises paramount to any alienation &c., ~~thereof~~, makes such lien prior to that of a mortgage on the lands given before 1879, and is within the power of the legislature.

Bill to foreclose. On final hearing.

Mr. R. P. Wortendyke, for complainant.

Mr. P. W. Stagg, for the inhabitants of the township of Palisades.

THE CHANCELLOR.

The bill is filed to reform and foreclose a mortgage on land in the township of Palisades, in Bergen county. The mortgage was given in 1872, by Jacob S. Wetmore to the executors of Samuel R. Demarest, deceased, by whom it was assigned to the complainant. There are no words of inheritance in it, but the estate granted is to the executors, "their survivors or survivor, or their or his successors and assigns, to them and their own proper use, benefit and behoof forever." The mortgage was given to secure part of the purchase-money of the mortgaged premises on the conveyance thereof by the executors to the mortgagor, by deed of even date with the mortgage. It expressly conveys the property with all and singular the tenements, hereditaments and appurtenances, and the reversions and remainders, rents, issues and profits, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of, in and to the property. The inten-

Lydecker v. Palisade Land Co.

tion to convey a fee is evident, and the mortgage will be reformed accordingly.

The property is subject to the taxes for 1879 and 1880. The complainant insists that notwithstanding the provisions of the act entitled "A further act concerning taxes, making the same a first lien on real estate, and to authorize sales for the payment of the same," passed in 1879 (*P. L. of 1879 p. 340*), her mortgage is paramount to the lien of those taxes. That act provides that any and all taxes which shall or may thereafter be laid, assessed or imposed, pursuant to the laws of this state, against any person or persons or corporations, for or on account of any lands, tenements, hereditaments or real estate, situate, lying and being in this state, together with lawful interest thereon accruing, and all costs, fees, charges and expenses in relation to the levy, assessment and collection of said taxes, shall be, become and remain, from and after the date of such levy and assessment, a full and complete first and paramount lien on all the lands, tenements, hereditaments or real estate, on account of which such levy and assessment shall be made, for the space of two years from the time when such taxes so assessed were payable, and that any and all estates therein, whether legal or equitable, and any and all mortgages, alienations, devises, descents, liens and encumbrances of every kind and nature, of, in, upon or against such lands, tenements, hereditaments or real estate, shall be in every respect subject and subservient to the lien of the aforesaid taxes, interest, costs, fees, charges and expenses. The language of the act is too plain to admit of any question as to the intention of the legislature. But the complainant insists that the act is in contravention of her constitutional right; that it impairs the obligation of her mortgage by giving taxes priority of lien over it, such lien not having existed when her mortgage was given. But it is established that the legislature has power, by virtue of its sovereignty, to make taxes a lien upon the estate of all parties interested in the land, and to make the tax title paramount to all other and prior claims and encumbrances. *Trustees of Public Schools v. City of Trenton*, 3 *Stew. Eq.* 667; *City of Paterson v. O'Neill*, 5 *Stew. Eq.* 386. There will be a decree in accordance with these views.

Atha v. Jewell.

BENJAMIN ATHA et al.

v.

CLAUDE B. JEWELL et al.

Complainants bought lands adjoining their factories in 1879. The title to interest therein (supposed to be one-sixth) was in some doubt, but no suit therefor had appeared since 1846, and they were assured that their title was good. In order to fortify their title, they took a transfer declaration of sale of the premises for taxes, made in 1869. Afterwards contracted for the erection of buildings and machinery on the lands, to be used in connection with their other works, and erected the buildings thereon accordingly. On a bill *quia timet*, filed by them to quiet their title to the interest therein, certain claimants appeared, and the proceedings in suit were dismissed as to them. On a bill for partition—*Held*, that the circumstances of the case were not such as to deprive complainants of the right to a partition between them and the owners of the interest.

Bill for partition. On final hearing on pleadings and proofs.

For D. A. Ryerson, for complainants.

For A. Q. Keasbey, for defendants.

NOTE.—Where improvements have been made by a tenant in common, in faith, he is entitled, on a partition of the land, to have the part so improved allotted to him, or, if such allotment be injurious to his cotenant, then to receive compensation therefor. *Freeman on Part.* §§ 509–511. Also, *Reed v. Reed*, 68 Me. 568; *Pope v. Whitehead*, 68 N. C. 191; *Collett v. Henderson*, 33 C. 337; *Sanders v. Robertson*, 57 Ala. 465; *Spitts v. Wells*, 18 Mo. 468; *Spitts v. Leake*, 25 Miss. 199; *Paddock v. Shields*, 57 Miss. 340; *Roberts v. Roberts*, 79 Ill. 246; *Allen v. Hall*, 50 Me. 253; *Reeves v. Reeves*, 11 Heisk.

Fair v. Fair, 121 Mass. 559; *Carland v. Jones*, 2 Jones Eq. 506; *Withers v. Withers*, 4 Mon. 323.

The rule seems well settled that one tenant cannot charge his cotenant with a part of the costs of improvements put on their lands, without the latter's assent. *Chambers v. Jones*, 72 Ill. 275; *Austin v. Barrett*, 44 Iowa 488; *Crest v. Crest*, 3 Watts 238; *Carland v. Jones*, 2 Jones Eq. 506; *Freeman on Part.* § 511; *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Morgan v. Morgan*, 23 La. Ann. 100. See *McAdam v. Orr*, 4 Watts & Serg. 550; *Drennen v. Walker*, 21 Ark.

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THE CHANCELLOR.

This is a suit for partition. The land of which partition sought is a lot of about one and fifty-eight hundredths ac lying on the southerly side of the Passaic river, in the c of Newark. It was formerly the easterly part of a tract of ≡ meadow of about six acres. The complainants, Messrs. A and Illingworth, claim to be the owners of five-sixths of 1 property. They bought it in 1879 of David S. Brown a wife. Their deed is dated July 19th in that year. At t same time they bought from the same parties the lot of abo one and thirty-two hundredths acres adjoining it on the wester side. When they purchased those two lots they were the ow ers of the land adjoining the latter lot on the westerly side, and were in the occupation of it, carrying on there a very extensi v business in the manufacture of cast steel, &c., and they pu chased the two lots in order to extend their works. Soon aft buying them they took possession, and immediately began filli in the low places on them and erected a high fence, at a co of about \$500, along the northeasterly and southeasterly sides of the lot of which partition is sought. On the two lots the erected a large frame furnace building about one hundred a nine feet by eighty-five feet, about two-thirds of which a on the lot in suit. They also erected another small buildi a gas-house, on the lot. The permanent improvements p by them on the two lots cost them upwards of \$30,00 and were necessary facilities for the conduct of their bu :

Or, for repairs expended on the premises without notice or requ *Doane v. Badger*, 12 Mass. 66; *Mumford v. Brown*, 6 Cow. 475; *Stevens Thompson*, 17 N. H. 103; *Taylor v. Baldwin*, 10 Barb. 582, 636; *Dech's App* 57 Pa. St. 467; *Culbert v. Aldrich*, 22 Mass. 74; *Young v. Gammel*, 4 Gree (Iowa) 207; *Coolidge v. Hager*, 43 Vt. 9.

Aliter, after such notice and request. *Louvalle v. Menard*, 6 Ill. 39; *Garner v. Diederichs*, 41 Ill. 158; *Anderson v. Greble*, 1 Ashm. 136; *Denman Prince*, 40 Barb. 213; *Grannis v. Cook*, 3 N. Y. Sup. Ct. 299; *Sears v. Munson*, 23 Iowa 380; *Reed v. Jones*, 8 Wis. 421; *McDearman v. McClure*, 31 Ar. 559; *Graham v. Pierce*, 19 Gratt. 38; *Clark v. Plummer*, 31 Wis. 442.

The costs of such repairs, *semble*, are a personal charge on the cotenant *Huston v. Springer*, 21 Barle 97; see *Harman v. Osborne*, 4 Paige 336. And if he refuse to contribute, he cannot maintain an action for damages against his cotenants because they did not repair. *Stallings v. Corbett*, 2 Speer 613.

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ss. There is a large amount of machinery in the buildings. It appears that when they bought the lot in suit they were aware of the fact that there might be a question as to their title, so far as regarded an undivided sixth of the land. The property had been conveyed by Ellison Conger as his own in 1846, and again subsequently, after he had regained the title, in 1861; but it was supposed that his title might not have been perfect, but there had been many years (more than thirty) of non-claim by any one interested adversely to him and those who held under him, and during all that time no one except him and those claiming under him, had given any attention whatever to the property. It had been sold as long ago as 1869, for unpaid taxes of 1868, and the city had bought it in and had taken a declaration of sale, which was transferred to the complainants as a fortification of their title. Their title, if Ellison Conger, indeed, was not the owner of the whole property, was supposed to have been made good through limitation as to the undivided interest before referred to. They believed it was good and that they might safely proceed to put permanent and costly improvements on the property, and they did so accordingly. They had been told of the possible defect in the title, but relied on their possession and the title obtained from their grantors. They appear, according to Mr. Atha's testimony, to have been advised that as far as their busi-

The representatives of a tenant for life cannot claim from the remaindermen value of improvements erected by such tenant. *Scott v. Guernsey*, 48 N. H. 406; *Cannon v. Hare*, 1 Tenn. Ch. 22; see *Bond v. Hill*, 37 Tex. 626; *Way v. Way*, 42 Conn. 52; *Piper v. Farr*, 47 Vt. 721; *Broyles v. Waddell*, 11 Cal. 32.

Whether the benefit of improvements put upon the premises by one tenant, in making a partition, can be claimed. *Parsons v. Copland*, 38 Me. 537; *West v. Huff*, 2 Sandf. Ch. 98; *Annelly v. De Saussure*, 12 S. C. (N. S.) 488; *Clapp v. Jones*, 1 Jones Eq. 173; *Taylor v. Foster*, 22 Ohio St. 255.

At a partition, the liability for improvements erected before, ceases. *Crafts v. Gray*, 13 Gray 369; *Hoyt v. Kimball*, 49 N. H. 322; *Grier v. Fletcher*, 17 Vt. 17; *Beardsley v. Knight*, 10 Vt. 185.

Improvements are estimated, not at their cost, but at the value which they have imparted to the premises. *Moore v. Williamson*, 10 Rich. Eq. 323; *Whitehead*, 68 N. C. 191. And the allowance, *semble*, ought to be by cross-bill. *Mahoney v. Mahoney*, 65 Ill. 406.—REP.

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ness purposes (meaning the use of the property) were concerned, the title which they had would be just as good for them as if their title of record were perfect, but if they should want to sell or mortgage the property the defect might affect the valuation. After purchasing the property, they, by advice of counsel, took proceedings under the act to "compel the determination of claims to real estate in certain cases and quiet the title to the same." The result was the appearance of claimants to the interest, but the bill was dismissed as to them, and this suit was then begun. At the time when the complainants obtained information that the claimants insisted upon the validity of their title to an interest in the property, the buildings had not been built on the property, but they had been contracted for, and foundations for them and for the machinery to be put into them had either been laid or preparation by driving piles had been made therefor, and the machinery had been ordered. Mr. Atha testifies that at that time they had been involved in an expense in the improvements of over \$25,000, and if they had then stopped them they would have been liable on the contracts, on which they had actually paid a considerable sum of money, and that work to the amount of \$10,000 or \$15,000 had been done. And he further says that they could not have stopped them without very great sacrifice.

The main question presented is, whether the complainants are, in equity, entitled to consideration with respect to those improvements. The defendants insist that they are not, but that partition should be made of the property as it was when the bill was filed, making no allowance to the complainants for the improvements. On the one hand, the complainants insist that there remains of the lot a piece of twenty feet front on the river, running through to the rear, not occupied by their buildings, which is enough to answer all equitable claim of the defendants in the partition; that that piece, or part of it, as justice may require, may be assigned in severalty to the defendants, or if the whole of it should not be enough for that purpose, owelty may be awarded. On the other hand, the defendants urge that the complainants have forfeited all claim to equitable consideration, be-

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cause of their attempts, which the defendants impute to them, to defeat by bill to quiet title what is now conceded to be the just claim of the defendants to a share of the property, and also because their improvements were made after they had knowledge of the existence of such claim, and knew that its validity and justice would be insisted on. Under the circumstances disclosed by the evidence, the fact that the complainants filed the bill to quiet the title cannot disentitle them to the consideration and protection of equity in the premises. As before stated, for more than thirty years there had been neither claim made nor attention given to the property, either by the defendants or any one under whom they claim. Whether there was in fact any valid outstanding claim of title to the property, was believed to be quite doubtful, and if any such there were, there was doubt as to the amount of the interest and who owned it. The case was one of the kind for which the statute was designed, and there is no room for the imputation of fraudulent design in the filing of that bill. When the complainants received information that there was a claim which it was insisted could be established, to an interest in the property, they had proceeded to a considerable distance in their improvements, which had been undertaken while as yet they presumed that their title was good to the whole of the property. Nor is there, in their proceeding to make their contemplated improvements, then already in fact not only contracted for, but begun—improvements very necessary for their business—any ground for attributing to them the inequitable design of rendering the defendants' interest less valuable or more easy of acquisition by themselves, by reason of their having occupied the greater part of the property with their improvements. It is an established principle that a court of equity, in decreeing partition, does not act ministerially and in obedience to the call of those who have a right to the partition, but founds itself on its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree adjust the equitable rights of all the parties interested in the estate, and see to it that partition is made

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accordingly. And in making these adjustments, it will not confine itself to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate which have been derived from any of the original tenants in common, and will, if necessary for this purpose, direct a distinct partition of several portions of the estate in which the derivative alienees have a distinct interest, in order to protect that interest. *Story's Eq. Jur.* §§ 656 b, 656 c. So, if improvements have been made by a tenant in common, suitable compensation will be made to him on the partition, or the part on which the improvements are will be assigned to him. *Id.* § 656 b. In *Brookfield v. Williams*, 1 Gr. Ch. 341, a person owning certain shares (four-sixths) of a small tract of land of fourteen acres, tore down the old house and barn on it, which had gone to decay, and built a new house and out-buildings at a cost of \$2500, and greatly improved the lot by cultivation and making new fences. He knew that he owned only four-sixths of the property, and he had no consent (there was no objection or opposition) to the improvements from his co-tenants in common. The court said he had acted in good faith and with an honest purpose of improving the property, and protected him in his improvements accordingly. In *Doughaday v. Crowell*, 3 Stock. 201, a suit for partition, the complainant had acquired seven-eighths of a tract of fifty acres, and had tried in vain to get a deed for the other eighth. After her failure to get the remaining eighth, she put valuable improvements on the land. The court gave her partition on equitable terms, so as to secure to her the benefit of her improvements. In *Hali v. Paddock*, 6 C. E. Gr. 311, the bill was for partition. The complainant's title was defective, but he was not aware of it when he made his improvements (which were very considerable) on the property. He sought equitable partition against the defendant, who, having established his claim by ejectment, was proceeding to a partition at law. The chancellor said :

“The rule that a tenant in common who has made improvements on the land held in common, is entitled to an equitable partition, is well established

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and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants or encumbering their estate or hindering partition. And the fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition."

It is quite clear that the complainants in this case are entitled to the aid of equity; that they are entitled to have a partition in which the land on which their buildings stand will be set off to them. But it may be that the residue of the land, if awarded to the defendants, will not be enough to answer the purposes of an equitable partition, so far as they are concerned, either because it would not be sufficient in quantity, or if sufficient in quantity, would not sell for as much as it would bring if sold with and as a part of the whole lot, and therefore is not enough in value. If that be so, the complainants must pay owelty. In *Brookfield v. Williams, ubi supra*, the Chancellor said:

"The justice of the case, however, strikes me as plain (and that is mainly to be looked at) that the complainants should be allowed their share in the land on which the buildings erected by their ancestor are located. If the land on which they stand be more than their share, they must make recompense in money, but if the remaining lands are sufficient to give the defendants their share in value, it must be given out of them."

The question as to whether the complainants shall be required to account to the defendants for use and occupation was suggested on the hearing. It appears, as before stated, that the complainants went into possession of the property in or about July, 1879. It also appears that they expended money in the improvement of the lot by filling in and fencing. They have undoubtedly, since they began to build, which was about the time they took possession, had exclusive use of the land. Mr. Atha says that as near as he can say, they began their improvements the latter part of July, 1879. He adds that they had driven between five and six hundred piles before October 1st, 1879, and they fenced the property. But there was never any rent received from the property. It produced nothing, was a mere building lot, and it

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does not appear that the complainants occupied more than what would have been their share if their share had been assigned to them in severalty. The defendants never demanded, nor, as far as appears, expressed any desire to have any possession of the residue of the lot. Under the circumstances there should be no account for use and occupation. If the complainants filled in the lot, or otherwise improved it, as they did, with the fence, it would be taken into account if there were an account for use and occupation.

There will be a reference to a master to ascertain and report the respective interests of the parties in the property, and whether a decree can justly and equitably be made by assigning to the complainants the part of the lot whereon the buildings stand and to the defendants their share out of the rest of the land; and whether the part of the lot whereon the buildings stand is more than the share of the complainants, and if so what owelty should be paid by them to make the partition equitable, if that part be assigned to them.

EDWARD H. MURPHY

v.

DAVID COATES et al.

Two mortgages were given, one in 1854 and the other in 1855, and duly recorded, to H., who died in 1874, and gave them to his daughter M. In 1879, M. asked of the mortgagor, who then owned the mortgaged premises, an acknowledgment that the mortgages, on which nothing had ever been paid, were still valid securities, to which the mortgagor agreed, and, in the presence of a witness, signed such an acknowledgment, endorsed on each mortgage. Afterwards the mortgages were assigned by M. to the complainant, who sent them to the mortgagor to obtain his admission as to the genuineness of his signature (his mark), and the mortgagor thus obtained possession of them, and ever after professed to be unable to find or produce them.—*Held*, that the acknowledgment destroyed the presumption of payment from lapse of time as to the mortgagor, and that, as a second mortgagee, such mortgagee had

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constructive notice from the record, where the mortgage was uncanceled, put him on inquiry, and that the proof in the case showed, outside of the acknowledgment, that the mortgages had never been paid.

bill to foreclose. On final hearing on pleadings and proofs.

Tr. James Buchanan, for complainant.

Tr. James Buchanan, for answering defendants.

THE CHANCELLOR.

The bill is filed to foreclose two mortgages on land in Trenton, N. J., made by David Coates to Louis Hargous, one, April 6th, 1854, for \$200, payable in one year, with interest, and the other, January 15th, 1855, for \$278, also payable in one year, with interest. Both mortgages were duly recorded in the month in which they were made. Hargous died in March, 1874. He held the mortgages at his death. By his will he gave the residue of his estate, of which residue the mortgages formed part, to Maria M. Hargous, who thus became the owner of the mortgages. She was one of the executors. In March, 1879, she, being desirous of obtaining from David Coates, who still owned the mortgaged premises, as he does now, an acknowledgment that the mortgages (on which nothing had ever been paid) were still unpaid and were valid securities, obtained Coates's signature (which he appears to have given willingly) to an endorsement on each of the mortgages and each of the bonds which they were respectively made to secure; that part of the principal or interest had been paid from the date of the instruments, and that the whole of the principal and the interest from the date of the instrument was due and unpaid. Her nephew, Louis Hargous, the nephew of Maria M. Hargous, obtained Coates's signature to the endorsements. He called on Coates with the bonds and mortgages for the purpose, and took James Cunningham with him. The latter swears that Hargous told Coates that he had the papers, and asked him if he was willing to sign them, and Hargous asked Cunningham to read them, which he

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did twice, and Hargous then asked Coates if they were satisfactory, and Coates said Yes, he owed the money and was willing to do everything that was right ; that Hargous asked Coates to sign the papers, and Coates said he would not, for he could not write, but asked Cunningham to write his name for him, and said that if Cunningham would do so, he would make his mark ; that Cunningham wrote Coates's name, and Coates took the pen and made his mark, and that this was done on all the papers. Peter Hargous swears that he told Coates that he had come to get him to sign, and told him his reason for wanting him to sign, viz., to save his aunt from any loss, and says he added that he knew Coates would do what was right after the endorsements were read to him. He further says that after the endorsements were read to Coates, the latter signed them, and that there were four papers. On the 11th of June, 1879, Maria M. Hargous assigned the bonds and mortgages to Edward H. Murphy, the complainant. On the 4th of August following, Murphy sent Peter Bakes with them to Coates to get the acknowledgment of his signature (his mark) on the endorsements. Bakes went to Coates's house and showed him the papers, and Coates said he knew nothing about them. Bakes asked him about his mark, and he replied that he did not know anything about that. Coates told Bakes to come again the next day. Bakes asked him if he was ready to make the acknowledgment, and Coates asked him to let him see the papers, and Bakes handed them to him, and Coates kept them and refused to return them. He has ever since professed to be unable to produce them. It is not improbable that he has destroyed them. In February, 1876 (before he signed the acknowledgments), Coates executed another mortgage on the same property to the defendant Frederick Walter, for \$276, and interest.

Both Coates and Walter contend that no suit for foreclosure can be maintained on the complainant's mortgages, because, as they insist, they are, from lapse of time, presumed to have been paid. But the presumption of payment which arises in regard to mortgages from lapse of time, without payment of interest or demand made, is only a presumption, and it is one which may be rebutted.

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Maker's Exrs. v. Van Buskirk, Saxt. 685 ; Bamed v. Bamed, E. Gr. 245. In this case, as to Coates, he has acknowledged, both verbally and in writing, that neither principal nor interest has been paid. And as to Walter, the second mortgagee, actual notice (constructive notice, at least, from the records) of the existence of the complainant's mortgages, and inquiry would have led him to the knowledge that they were wholly unpaid. The records showed the mortgages, and as far as the records went, that they were not satisfied, for they were not canceled of record. Coates, in his testimony in this cause, swears that nothing has ever been paid on account of either principal or interest. Harter, the mortgagee, appears to have been his employer, and to have been very indulgent to him.

Again, it may be remarked, that Walter's mortgage was given, not to secure a loan, but to secure a precedent debt, which, he had run for a good while, it might have been for a long time, and though he says it includes a sum of money (he says it amounts about \$60), which he alleges he lent to Coates, that money was lent some weeks before the mortgage was given, and it does not appear to have been lent on the security of the mort-

The complainant is entitled to a decree for foreclosure and sale, and his mortgages are entitled to priority over the mortgage to the defendant.

JAMES H. STEVENS

v.

CORTLANDT V. REEVES and wife.

The mortgage was given in 1871, to a partnership firm, payable in ten years. The firm assigned it to the complainant, as collateral security for their debt. *Held,* That usury, taken by the complainant from the partners on their note, cannot be set up as a defence by the mortgagor on foreclosure.

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(2) That the omission of the assignor as a party to a foreclosure by the complainant (who held the mortgage as collateral, as before stated), no objection on that ground being raised by the answer, and no necessity for his being made a party appearing, could not be set up at the hearing.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. M. B. Taylor, for complainant.

Mr. J. B. Huffman, for defendants.

THE CHANCELLOR.

The questions presented by the briefs of counsel are these four: First, whether the amount of a certain check of \$120, drawn by R. D. Edwards & Son, on the First National Bank of Camden, dated June 21st, 1875, and payable to complainant or bearer, which is admitted to have been paid on account of the mortgage in suit, is included in a general credit of interest paid to "March, 1875," on the note, as collateral security for which the complainant holds the bond and mortgage. Second, whether the amount of two other checks, drawn by R. D. Edwards & Son, on the Cumberland National Bank, one for \$100, dated May 11th, 1875, payable to self or bearer, and the other for \$246, dated May 29th, 1875, payable to the complainant or order, should be credited as payments on the note. Third, whether the defendants are, seeing that they have not set up usury in their answer, entitled to a credit of the unlawful interest proved to have been paid on the note from its date to March 18th, 1875; and fourth, whether the mortgagees, who assigned the bond and mortgage to the complainant, as collateral security for the payment of their note to him, are necessary parties to this suit.

The bond and mortgage are dated March 11th, 1871, and were given by the defendants to Richard D. and James H. Edwards, to secure the payment of \$1,178 in ten years, in equal annual payments, with interest annually. The note, as collateral to which the complainant holds them, is for \$1,000 and interest, is

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ed March 18th, 1875, and was made by the mortgagees, by
ir firm name of R. D. Edwards & Son, in his favor.

First, as to the \$120 check. The complainant swears posi-
ely that the amount of it was included in the credit, endorsed
the note, of interest paid up to March, 1875. He says that
ck paid the interest in full on the note up to March 18th,
75. Opposed to this is the testimony of James H. Edwards,
o says that that check was not, to his knowledge, included in
credit of March 18th, 1875; that he is positive it was not;
it it was a credit to go on the note outside of that; that it is not
cluded in any of the credits on the note, and that it should be
dited on the note on the day of its date. On cross-examina-
n he says that he paid all the interest himself, but cannot tell
what day, as he has nothing to show for it; that he paid it
money and took no receipt for it, and that he never paid
erest in checks. He adds that he has overhauled the books
d finds no checks to the complainant's credit for interest.
ing re-examined in chief, he says, to the best of his knowledge,
e interest was all paid up to March 18th, 1875, before he gave
e check. It is quite probable he is mistaken when he says
at he never paid interest on the note in checks, for he cer-
inly did make payments on account of the note in checks.

He claims to have given the check in controversy on account
f the note, and he also swears that two other checks for \$100
nd \$246 respectively, dated in May, 1875, were, to the best of
is knowledge, given to the complainant as payments on the
ote; and he testifies also, positively (and correctly), that another
heck for \$100, dated in August, 1878, and still another for
75, given on or about September 1st, 1875, were given on ac-
ount of the note. Moreover, the qualified way in which
e expresses himself when he says the amount of the check was
ot covered by the receipt for interest up to March 18th, 1875,
s some evidence at least that he is not quite confident of the ac-
uracy of his recollection. Again, as will be seen when his tes-
imony in reference to the two checks dated in May, 1875, for
\$100 and \$246 respectively, is considered, his testimony is not
entitled to such credit as that his statement (certainly somewhat

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qualified, to say the least of it), from recollection should be ~~per~~mitted to countervail the positive testimony of the complainant to the contrary. Edwards swears that "to the best of his knowledge" those checks were payments on account of the note. The complainant, on the other hand, swears that they were not, but were checks drawn by R. D. Edwards & Son on the Cumberland National Bank, to be deposited to their own credit in the First National Bank of Camden, of which the complainant was at that time cashier. The books of the bank corroborate him, but Edwards's testimony on the subject is in no way supported. The conclusion is that those checks and the \$120 check should not be credited on the note; the amount of the latter having already been credited thereon, and the former not having been given to the complainant at all, nor on account of the note in any way, but the amounts thereof having gone to the credit of R. D. Edwards & Son for their own use.

It is admitted by the complainant that he received interest at the rate of twelve per cent. per annum on the note from its date up to March 18th, 1875. The complainant's counsel insists that the defendants cannot, under the practice of the court, be permitted to avail themselves of this fact by way of defence or even of credit on the note, because the defendants have neither set up usury in their answer nor claimed the benefit of the unlawful interest. But the defendants are in no situation to plead or claim the benefit of the unlawful interest. The note was not given by them and does not represent their debt. The bond and mortgage are the evidences of their indebtedness, the note of that of R. D. Edwards & Son. If unlawful interest has been paid on the note it is a matter which does not concern the defendants, and of which they can have no advantage.

The bond and mortgage were assigned to and are held by the complainant merely as collateral security for the note. That fact does not appear by the bill but it does by the proof. The complainant produces two assignments, one written on the mortgage and the other a separate paper. The former, by its terms, expressly assigns the bond and mortgage as collateral security merely. That assignment not having been acknowledged could

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be recorded, and therefore the other, which is, by its terms, lute, was executed and acknowledged and recorded. In his mony, the complainant says the assignments were as collateral security for the payment of the note and he also says that if the note is all paid the mortgage should be canceled.

The defendants, who are the mortgagor and his wife, state in their answer that they have paid the amount of the mortgages, that the latter paid it to the assignee. This is not proved, and the answer is not evidence of the fact, but the statement is in accordance with the allegation of the complainant that the mortgagees have no claim to any surplus of the amount presently due on the mortgage over the amount due on the note.

Richard D. Edwards, the senior partner of the firm of D. Edwards & Son, is dead; James H. Edwards, the other partner, has, as has been seen, been a witness in the cause and has not denied or questioned the above-mentioned statement of the complainant that when the note is paid the mortgage should be canceled. He has not set up any claim to any surplus

or any interest in the mortgage in view of any surplus. Though it is a general rule that if the assignment of a mortgage is not absolute, but merely as collateral security, the assignor is a necessary party to the suit (*Miller v. Henderson*, 2 Stock. 320), if no necessity appears on the face of the pleadings for making him a party, and it does not appear that he has any interest, an objection made at the hearing that he is not a party will not avail. *Woodruff v. Depue*, 1 McCart. 168. Here it does not appear by the bill that the mortgagees have any interest in the surplus. The answer is silent on the subject. It makes no objection for want of parties. The complainant alleges in his testimony that the mortgagees have no interest in the surplus, and the surviving mortgagee, when on the stand as a witness, does not deny it. Moreover, the entire testimony is devoted to showing how much is due on the mortgage, but how much is due on the note, and the complainant proposes to take a decree for any surplus. The objection of want of parties does not prevail.

There will be a decree for the complainant for the amount due on the note, \$1,410.70, and his costs.

Woolsey v. Cummings Car Works.

BENJAMIN F. WOOLSEY

v.

THE CUMMINGS CAR WORKS.

Exceptions to a master's report on the accounts of a receiver appointed by this court, involving his management and disposal of the trust property, and the amount of his compensation, considered and overruled.

In insolvency. On exceptions to master's report.

Mr. F. McGee, Mr. R. O. Babbitt and Mr. W. P. Wilson, for exceptants.

Mr. G. Collins, for the receiver.

THE CHANCELLOR.

Pursuant to orders of this court, the master reported upon the accounts of Mr. Chaddock, the receiver appointed by this court for the creditors and stockholders of "The Cummings Car Works," and the proper allowance to be made to him for his services in the trust. Certain of the creditors have excepted to the report. The several exceptants are Josiah F. Bailey and others, trustees for some of the creditors, Abner A. Griffing and E. S. Jaffray & Co. The exceptions of the last named are identically the same. To consider those filed by the trustees: The first and second complain of conclusions of fact drawn by the master from the evidence. In these conclusions he is fully sustained by the proof. The exceptions will consequently be overruled. The third is an objection to the finding of the master with respect to part of the price of certain goods of the trust, sold by him to a creditor. The receiver took, in part payment, at its full amount, a note of the company, on which the creditor would be entitled to a dividend in the distribution of the net proceeds of the assets; and took, at the same time, a well-secured guaranty in writing

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he payment of the difference, whatever it might be, between amount of the dividend, when declared, and the amount at which the note was taken. The transaction appears to have been to the advantage of the trust in the price at which the goods were sold; and the length of the credit given is not such as to amount to a breach of trust, especially in view of the pains taken and means employed to guard the trust against loss in the transaction. That exception will be overruled. The fourth exception is to the amount of compensation allowed by the master. There were three sales of the property of the trust. The first, which consisted of the real estate, machinery, tools, &c., took place in the latter part of May, 1877. It was set aside for inadequacy of price, and the property was again sold (but for a higher price) on the 1st of October following. The last sale was of certain engines in action, sold to close up the trust, and it took place in May, 1878. The master, after a review of all the facts, reports that the receiver's compensation should be \$200 a month, from the time of his appointment, October 17th, 1873, to the 1st of May, 1878. He also reports that the receiver should be allowed something for his services and expenses in finding a receiver's certificate of the New York and Oswego Midland Railroad Company, delivered by Mr. Chaddock to certain creditors of the car company by mistake (two being delivered instead of one, to which they were entitled), the loss of which was not discovered until the examination before the master. The receiver was the treasurer of the car company. At a meeting of the creditors and stockholders, held in view of its embarrassments and the necessity of applying for the appointment of a receiver, he was designated as the proper person to be appointed receiver, and the amount suggested as his compensation was the amount which he was receiving as treasurer, \$200 a month, for his expenses of office; his compensation, however, to be fixed, of course, by this court. He stated to the meeting that he would act as receiver if appointed, and would draw \$200 a month for the expenses of his office, leaving it to this court to fix his compensation. He has rendered services of a very valuable character to the trust for a considerable length of time; he conducted, under order of this

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court, the business of the company, railroad car building, and **he** has generally given to the business of the receivership, **careful** and valuable attention. I find in the evidence no reason for **any** imputation whatever that in any of his transactions in the trust, he has been governed or actuated by any unworthy motives, **or** sought to promote his private ends. Nor do I think the allow-**w-**ance too great. The exception on this point, therefore, should **be** overruled. There is nothing before me from which I cou**ld** make an award of compensation to the receiver in respect of **h** **is** trouble or expense in finding the missing certificate, if I deemed **ed** it proper to make one; but, in my judgment, he is not entitle**ed** to **any** compensation in the matter. He would have been charg**e-**able with the value of the certificate if he had not been able **to** find or account for it.

Of the exceptions of Mr. Griffing and Messrs. E. S. Jaffr**y** & Co., the first objects to the payment by the receiver of **the** mortgage encumbrances which were on the property of the **com-**pany at the time of its failure, because they were made, as allege**d**, without authority; but it is clear from the evidence that the pa**y-**ments referred to, if made without an order, were made in **the** exercise of a sound discretion. The second exception is **an** objection to the order authorizing the receiver to carry on **the** business for the benefit of the trust. Obviously, the propriety of making the order, cannot be called in question by an except**ion** to the master's report on the receiver's account. The except**ion** will, therefore, be struck out. The third objects to the **finding** of the master that the business done by the receiver in manufac-**turing** under the authority just mentioned, was productive of profit to the trust. The fact is immaterial to any question legiti-**mately** arising on the master's report, unless it be as to the **amount** of compensation to be allowed to the receiver. That would **be** affected by losses incurred in the manufacturing business through **h** his negligence or misconduct; but no loss on those accounts, **or** either of them, is charged or appears. The exception will **be** overruled. The fourth exception is the same as one which **has** been already considered, the third exception of the trustees, whic**h** was overruled. The fifth and sixth exceptions refer to the com-

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pensation to be allowed to the receiver. For reasons already given on the exception on the same subject by the trustees, the exception will be overruled. The seventh, eighth, sixteenth, eighteenth and nineteenth exceptions are objections to the form of the receiver's accounts and the alleged non-production of vouchers. It appears, by the master's report, that the trustees and Mr. Griffing appeared before him at the taking of the account, and that the only objections made to the account or the allowance thereof, were those on which he has passed, none of which have any reference whatever to the subjects of the exceptions now under consideration. The other exceptants, Messrs. E. S. Jaffray & Co., did not appear before the master, and were let in to except on condition that they should adopt the exceptions of Griffing. Under the circumstances, the exceptions last specified should be struck out. The ninth, tenth, fourteenth, fifteenth and twentieth exceptions are merely general complaints, in the most general terms, of mismanagement of the trust estate. They will all be struck out. The eleventh is a charge of fraud and imposition, on the part of the receiver, on the court, in obtaining an order authorizing him to make a contract with the New Jersey and New York Railroad Company. The twelfth is a mere personal allegation of non-compliance, on the part of the receiver, with that order. The thirteenth charges misrepresentation, fraud and imposition on the court, on the part of the receiver, in obtaining an order to make a settlement with the last-mentioned railroad company. For reasons before stated, these exceptions will all be struck out. The seventeenth is an objection that the receiver ought not to be allowed for commissions paid on sales of goods of the trust to the railroad company just mentioned. This exception will, under the circumstances, be struck out, on the ground of surprise. The objection is made, for the first time, by the exception. Though all the exceptions will be either overruled or struck out, the exceptants will not, under the circumstances, be required to pay costs. Their action in excepting and pursuing the exceptions, was in behalf of all the creditors.

Newark Savings Institution v. Forman.

THE NEWARK SAVINGS INSTITUTION

v.

SAMUEL R. FORMAN et al.

The act of 1880 (*P.L. of 1880 p. 255*), providing that in foreclosure proceedings thereafter commenced, no personal decree for deficiency shall be taken, applies to mortgages given before the date of its passage, and is not, so far as cases in which there is a remedy at law are concerned, unconstitutional as depriving a party of any remedy for enforcing a contract which existed when the contract was made, because a more efficacious remedy of the same sort at law remains, and the legislature may, without infringing the prohibition of the constitution, take away one of two or more equally efficacious remedies of the same sort.

Bill to foreclose. Demurrer.

Mr. E. Q. Keasbey, for demurrants.

Mr. A. S. Hubbell, for complainant.

NOTE.—The following cases illustrate the rule that a statute taking away one remedy for enforcing a contract or right is not unconstitutional if another remedy remain.

Abolishing distress for rent. *Van Rensselaer v. Snyder*, 9 Barb. 302, 13 N. Y. 299; *Guild v. Rogers*, 8 Barb. 502; *Lockett v. Usry*, 28 Ga. 345; *Conkey v. Hart*, 14 N. Y. 22; *Van Rensselaer v. Hays*, 19 N. Y. 68.

Requiring that the makers and endorsers of a note shall be sued together. *McMillan v. Sprague*, 4 How. (Miss.) 647; see *Givens v. Western Bank*, 2 Ala. 397; *Baldwin v. Newark*, 9 Vr. 158.

Repealing a statute authorizing a state to be sued. *Memphis R. R. v. Tennessee*, (S. C. U. S.) 21 Alb. L. J. 355; *Tennessee v. Sneed*, 96 U. S. 69; or a county, *Hunsaker v. Borden*, 5 Cal. 288.

Repealing a statute authorizing the forfeiture of a corporation's franchise for non-payment of its debts. *Aurora Co. v. Holthouse*, 7 Ind. 59; *State v. Tower*, *beckbee Bank*, 2 Stew. 30; see *Powell v. Sammons*, 31 Ala. 552; *Story v. Furman*, 25 N. Y. 214; *Ireland v. Turnpike Co.*, 19 Ohio St. 369; *Read v. Frankford Bank*, 23 Me. 318.

Aliter, as to a repealer exempting the stock from liability, but rendering the stockholders personally liable. *Hawthorne v. Calef*, 2 Wall. 10; see *Cbant*, *Van Schaick*, 24 Barb. 87; *Read v. Frankfort Bank*, 23 Me. 318; *Coffin v. Richardson*, 45 Me. 507; *Syracuse Bank v. Davis*, 16 Barb. 188.

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This cause and two others (foreclosure suits) stand as on default, by order of the court, upon the claim and prayer of the complainant for a personal decree for deficiency, which is sought, in two of them, against a person who assigned to the complainant the property in which the mortgage was made to secure, guaranteeing payment. In the other it is prayed against the obligor in the bond, to secure payment of which the mortgage was made. In the first two cases first mentioned, the mortgages were given in 1873, and in the last the mortgage was given in 1875. The question is whether, in view of the provision of the first section of the act concerning proceedings on bonds and mortgages given for the purpose of the indebtedness, and the foreclosure and sale of the mortgaged property "thereunder" (*P. L. of 1880 p. 255*), this court has jurisdiction to make such decree. That section is as follows:

"In all proceedings to foreclose mortgages hereafter commenced, no decree shall be rendered therein for any balance of money which may be due complainant over and above the proceeds of the sale or sales of the mortgaged property, and no execution shall issue for the collection of such balance under foreclosure proceedings."

Deciding a summary remedy against a stockholder in default as to payments on his stock. *North East Alabama R. R. Case*, 37 Ala. 679.

Repealing a resort to a *mandamus*. *State v. Gaillard*, 11 S. C. 309, affirmed 17 S. S. C., March 2d, 1880; or a *scire facias*, *Parker v. Sharonhouse*, 1 Phil. C. 209; or an action of debt on a judgment after execution returned. *Wenon v. Chesley*, 48 Me. 369; *Dennis v. Arnold*, 13 Metc. 449.

Altering, by general statute, the venue of an action against an insurance company for loss under a policy. *Howard v. Kentucky Ins. Co.*, 13 B. Mon. 282; *Wells v. Hillsborough Co.*, 44 N. H. 238; see *Gut v. State*, 9 Wall. 35; *Osborn v. State*, 24 Ark. 629.

Repealing an act allowing a landlord to claim rent out of the proceeds of property seized on execution on the demised premises. *Stocking v. Hunt*, 3 Mo. 274; see *Barry v. McGrade*, 14 Minn. 163.

Providing that equity alone shall have jurisdiction of suits to recover property which had been set apart under the homestead laws and subsequently sold. *McLellan v. Weston*, 59 Ga. 883.

Reverting a judgment being obtained as soon as it could have been by the creditor in force when the debt was contracted. *Knoup v. Piqua Bank*, 1 Ohio

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The next section is as follows :

"In all cases where a bond and mortgage has or may hereafter be given for the same debt, it shall be lawful to proceed first to foreclose the mortgage, and if, at the sale of the mortgaged premises under said foreclosure proceedings, the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency ; and that in all suits on said bond, judgment shall be rendered and execution issue only for the balance of debt and costs of suit."

The third section is as follows :

"If, after the foreclosure and sale of any mortgaged premises, the person who is entitled to the debt shall recover a judgment in a suit on said bond for any balance of debt, such recovery shall open the foreclosure and sale of said premises, and the owner of the property at the time of said foreclosure and sale may redeem the property by paying the full amount of money for which the decree was rendered, with interest to be computed from the date of said decree, and all cost of the proceedings on the bond ; provided, that a suit for redemption is brought within six months after the entry of such judgment for the balance of the debt."

I have quoted the second and third sections because it is insisted by the complainant's counsel that the court should, in construing

*St. 603 ; Johnson v. Higgins, 4 Metc. (Ky.) 566 ; Cooley's Const. Lim. (4th ed.) *287 ; Woods v. Buie, 5 How. (Miss.) 285.*

Providing punishment for a crime, of a milder form. *State v. McDonald, 20 Minn. 136 ; State v. Kent, 65 N. C. 311 ; Cooley's Const. Lim. (4th ed.) *267 ; see Elliott v. Elliott, 38 Md. 357.*

Rescinding a mortgagee's right to occupy lands during the period allowed for redemption after foreclosure. *Berthold v. Fox, 13 Minn. 501 ; see Thorne v. San Francisco, 4 Cal. 127 ; Everson v. Shorter, 9 Ala. 713 ; Maynes v. Moore, 16 Ind. 116.*

Reducing the time limited for an appeal. *Smith v. Packard, 12 Wis. 371 ; see Burch v. Newbury, 10 N. Y. 374 ; Palmer's Case, 40 N. Y. 561 ; Jacquins v. Com., 9 Cush. 279 ; Willard v. Hartey, 24 N. H. 344 ; Hauser v. Hoffman, 32 Mo. 334 ; Sayres v. Com., 88 Pa. St. 291, 19 Alb. L. J. 83 ; Atkinson v. Dunlap, 50 Me. 111 ; Beaupree v. Hoerr, 13 Minn. 366 ; Griffin v. Cunningham, 20 Gratt. 52 ; or, the right to redeem a mortgage, Butler v. Palmer, 1 Hill 324 ; Holland v. Dickerson, 41 Iowa 367 ; see Cargill v. Power, 1 Mich. 369.*

Reducing the notice of sale under a mortgage. *Webb v. Moore, 25 Ind. 4 ; Cook v. Gray, 2 Houst. 455 ; Ashuelot R. R. v. Eliot, 52 N. H. 387.*

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st, take into consideration the constitutional objection to , he insists, the second and third are liable, and consider three together. But the first is clearly independent of the two. It is a simple enactment, intended to deprive the of the power to enter a personal decree for deficiency in a osure suit, and it may therefore stand alone. It is urged that section cannot, without a violation of the complainant's tutional rights, be applied to these suits, inasmuch as the and mortgages were given prior to the passage of the act, he constitution prohibits the legislature from passing any depriving a party of any remedy for enforcing a contract, existed when the contract was made.

to the passage of the act of 1866 (*Rev. p. 118 § 76*), the section of which provides that it shall be lawful for the ellor, in any suit for the foreclosure or sale of mortgaged ses, to decree the payment of any excess of the mortgage above the net proceeds of the sales by any of the parties to suit who may be liable, either at law or in equity, for the ent of the same, provided there be a prayer to that effect

ng from a court of law, by special statute, the determination of matters in a particular case. *Bank of Ky. v. Schuylkill Bank*, 1 *Pars.* 180.

ng away the remedy in equity against the representatives of a deceased : when the survivor is insolvent, and transferring it to law. *Bartlett v. ? Ala.* 401; *Paschal v. Whitsett*, 11 *Ala.* 472.

ng away a resort to equity to remove the apparent lien of a void assess- *Lennon v. New York*, 55 *N. Y.* 361.

ng a court of law jurisdiction where a person is a partner in two firms, which is plaintiff and the other defendant in a suit at law. *Hepburn s*, 7 *Watts* 300.

iding that only an action on the case could be maintained to recover es for the escape of a debtor. *Thayer v. Searey*, 11 *Me.* 284.

ng courts of quarter sessions exclusive jurisdiction over petit larceny ated a second time. *People v. Rawson*, 61 *Barb.* 619.

ng the court of common pleas exclusive jurisdiction over naturaliza- *Beavin's Petition*, 33 *N. H.* 89.

ther a statute providing that no action can be maintained for liquors constitutional. *Reynolds v. Geary*, 26 *Conn.* 179; *Opinion of Justices*, *H.* 539; *Lord v. Chadbourne*, 42 *Me.* 429; *Beebe v. State*, 6 *Ind.* 501; *Const. Lim.* (4th ed.) *583.

ther a lien law can be repealed so as to divest liens already acquired, see

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in the bill of complaint, no personal decree for deficiency was made in any foreclosure suit where there was a remedy at law, but only when there was no remedy except by means of equitable subrogation. And it is believed that the first suit in which a personal decree for deficiency was made in this court, even on that ground, was the case of *Klapworth v. Dressler*, *Beas.* 62, decided in 1860. Since the passage of the act of 1866, the court has exercised jurisdiction in accordance with the above provision of that statute. Still, during all that time the remedy at law has existed, as it still does, against the obligor of the bond secured by the mortgage, and against any guarantor of the bond. So far, therefore, as such persons were concerned, the remedy given in equity was cumulative merely, and the first section of the act of 1880 is a mere repealer of the fifth section of the act of 1866. The taking away of the remedy in equity in cases where a complete remedy at law of the like sort exists (where the decree is prayed against the obligor in the bond or guarantor), obviously only deprives the party of one of two remedies of a like character. It does not deprive him of any remedy more effective than the legal one; for the proceeding to collect the money after the decree for deficiency is the same as the remedy on a judgment at law. It does not deprive him of a

Streubel v. Milwaukee R. R., 12 Wis. 67; *Wabash Canal Co. v. Beers*, 2 Black 448; *Weaver v. Sells*, 10 Kan. 609; *Doellner v. Rogers*, 16 Mo. 340; *Hall v. Bunte*, 20 Ind. 304; *Frost v. Ilsley*, 54 Me. 345; *Evans v. Montgomery*, 4 Watts & Serg. 218; *Templeton v. Horne*, 82 Ill. 491; *Martin v. Hewitt*, 44 Ala. 418; *Brooks v. Memphis*, 3 Cent. L. J. 356; *Bailey v. Mason*, 4 Minn. 546; *Bango v. Goding*, 35 Me. 73; *Watson v. N. Y. C. R. R.*, 47 N. Y. 157; *Christman v. Charleville*, 36 Mo. 610; *Purmort v. Tucker Co.*, 2 Col. 471; *Allen v. Hain*, 63 Me. 532; *Coddington v. Beebe*, 5 Dutch. 550.

Whether execution can be stayed or suspended, conditionally, on judgments rendered on pre-existing contracts, *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Moore v. Fowler*, Hempst. 536; *Huntzinger v. Brock*, 3 Grant's Cas. 243; *Williams v. Waldo*, 4 Ill. 264; *Smith v. Bryan*, 34 Ill. 364; *Farnsworth v. Vance*, 2 Coldw. 108; *Chadwick v. Moore*, 8 Watts & Serg. 49; *Louisiana v. New Orleans (U. S. S. C.)*, 22 Alb. L. J. 496; *Edwards v. Kearney*, 74 N. C. 241, 96 U. S. 595; *Webster v. Rose*, 6 Heisk. 93; *Cooley's Const. Lim.* (4th ed.) *292; *Kentucky v. Williams*, 22 Alb. L. J. 457; *Davidson v. Wiley*, 31 Ala. 452; see, also, 7 Cent. L. J. 363; *Cooley's Const. Lim.* *292, *361.—**REP.**

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remedy more speedy than the legal one, for the decree for deficiency is merely a contingent one until after the sale of the mortgaged premises shall have taken place, and until then constitutes no lien on the defendant's land. *Bell v. Gilmore*, 10 C. Gr. 104. The remedy in equity may be more economical. The taking away of the remedy in equity does not deprive the creditor of any resort to person on property for the collection of debt. It does not even, as before stated, compel him to have recourse to a less rapid proceeding. The legislature may make laws which incidentally affect the pursuit of remedies for enforcing existing contracts; as, for instance, such as regulate the admission of evidence, the course of practice in the courts, the mode of conducting sales under judgments and executions, and varying the forms of action, or prescribing periods for the limitation of actions within a reasonable time. *Rader v. Road District*, 7 Vr. 273. The act under consideration leaves the complainant a substantial remedy (of the same kind as that taken away), according to the course of justice, as it existed when the contract was made a remedy, which is not only of the same sort, but is even more efficacious than that which it takes away. It only taken away one of two remedies of a like character, one at law and the other in equity, and that is no contravention of complainant's constitutional right.

RED JACKET TRIBE, No. 43, of the IMPROVED ORDER OF
RED MEN

v.

HEZEKIAH W. HOFF et al.

On a bill filed for the reformation of the bond of the treasurer of a society, where seals were omitted therefrom, and for a decree fixing the amount due from the treasurer and his surety—*Held*, that while the bond could be reformed as to the seals, no decree could be granted for the amount due thereon because the remedy at law was adequate, and a demurrer on the latter ground was sustainable.

Red Jacket Tribe v. Hoff.

Bill for relief. On general demurrer.

Mr. O. P. Chamberlin, for demurrants.

Mr. W. F. Herr, for complainants.

THE CHANCELLOR.

The bill is filed for two purposes: to supply the defect in a bond of want of seals, omitted through accident or mistake, and to obtain a decree in this court for the amount due on the bond. The bond was given by the defendants, Hoff as principal and Wilson as surety, to the complainants, and is conditioned for the faithful performance, by the principal, of his duties as treasurer of the complainants. Wilson files a general demurrer. The bill is clearly maintainable for the first-mentioned object. It appears by the instrument itself, which is set out in the bill, that it was intended to be a sealed instrument, and the complainants are in equity entitled to have the defect remedied, and the want of seals supplied. *Montville v. Haughton*, 7 Conn. 542; *Rutland v. Paige*, 24 Vt. 181. But they are not entitled to the other relief—a decree on the bond. Their remedy on the bond is a legal one, and there is no ground whatever laid in the bill for equitable relief on that score. Though reformation of a contract, and specific performance, or reformation of a mortgage and foreclosure, or rectification of a bond and an account, may be sought in the same bill, and relief obtained, the reason is that the remedies are not only both equitable, but the former (the reformation) is sought with a view to the latter (the specific performance, or foreclosure, or account), which is the principal object of the suit, and there is a manifest propriety in allowing the joinder in such cases. But in this case the bill seeks an equitable remedy and another which is merely legal. It has been said that a bill is not multifarious where it sets up one sufficient ground for equitable relief, and another claim which, on its face, contains no equity which can entitle the complainant to the interposition of the court, either for relief or discovery. *Varick v. Smith*, 5 Paige 136.

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en," says Judge Story, "a bill contains two distinct subject-matters, disconnected from each other, if one of them be clearly without the jurisdiction of a court of equity for redress, it seems that the court will treat as if it were single, and proceed with the other matter on which it has jurisdiction, as if it constituted the sole object of the bill."—*Story's Eq. Pl.*

ough the subject-matters of this bill, the rectification of the deed and the assessment of the damages thereon, are connected together, yet the latter relief is one which the court, in the ordinary exercise of its authority, cannot properly grant. The proper remedy for such relief is a court of law. *Berry v. Van Winkle, 1 N. H. 269; Iszard v. May's Landing Co., 4 Stew. Eq. 511; v. Jewett, 5 Stew. Eq. 302.*

Justify a court of equity in granting relief as consequent upon disallowance. Judge Story, "it seems necessary that the relief should be of the same nature as a court of equity may properly grant, in the ordinary exercise of its authority. If, therefore, the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be a strong reason for refusing the exercise of the jurisdiction, since it is the appropriate function of a court of law to superintend such trials. And in many other cases where the relief arises, purely of matters of fact, fit to be tried by a jury, and the result dependent upon that question, there is equal reason that the jurisdiction should be altogether declined; or at all events, that if the bill be granted, a trial at law should be directed by the court, and the relief granted or withheld, according to the final issue of the trial."—*1 Story's Eq.*

The bill is therefore bad, so far as the purely legal claim is concerned. In *Varick v. Smith*, cited above, it was said that the proper course for the defendant, in such a case as this, to pursue, was to answer as to the equitable cause of suit, and demur to the bill for want of equity, or that he may answer as to both, and waive the objection as to the want of equity in the legal claim remaining. I think the defendants should not be required to answer so much of the bill under consideration as concerns the legal relief which it seeks. The demurrer will therefore be sustained.

O'Neill v. Clark.

JOHN P. O'NEILL, receiver &c.,

v.

AMOS CLARK, JUN., et al.

1. Deed reformed by striking out an assumption of a mortgage inserted through the mistake of the scrivener, and accepted by the grantee in ignorance thereof.

2. A *bona fide* release of an assumption of a mortgage was verbally agreed upon before suit brought to foreclose the mortgage, but the release was not executed until after suit brought. Without knowledge of the existence of the suit, it was executed and the consideration paid.—*Held*, to discharge the assumption.

Bill to foreclose and bill in the nature of a cross-bill. On final hearing on pleadings and proofs.

Mr. T. A. Jobs, for complainant in original bill.

Mr. W. P. Wilson, for Amos Clark, Jr., and for William A. Clark, complainant in cross-bill.

THE CHANCELLOR.

The controversy between the parties is in reference to the liability of Amos Clark, jun., and William A. Clark, his son and grantee, to a personal decree for deficiency. The suit is for foreclosure and sale of mortgaged premises. The complainant is the receiver (appointed by this court) of the Continental Life Insurance Company. The mortgage in suit was given to that company June 30th, 1871, by Josiah Oakes and Susan A., his wife, to secure the payment of \$12,000 with interest, according to Oakes's bond to the company. The mortgaged premises are in the city of Elizabeth. On January 10th, 1872, Oakes and his wife conveyed the property to Amos Clark, jun., subject to the mortgage, the payment of which he thereby assumed; the amount of it being allowed to him as so much of the consideration of the

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eyance. On December 17th, 1877, Clark and his wife conveyed the premises to their son, William A. Clark, subject to the mortgage. The deed from them to him contained a declaration of the assumption of the payment of the mortgage by him as a part of the consideration of the conveyance. Though that deed recited a consideration of \$12,500, it was in fact without consideration, and merely voluntary, a mere deed of gift. It was offered as a wedding present to William on the occasion of his marriage. The complainant's bill was filed April 2d, 1879. In it he prays a personal decree for deficiency against both Susan and William Clark. The *subpœna ad respondendum* was issued on the bill on the 15th of that month. By deed dated the 10th of that month, eight days after the filing of the bill, five days before the issuing of the subpœna thereon, Susan Oakes, executrix of the will of Josiah Oakes, the mortgagor (who had previously died), for the consideration of \$500 paid to her by Amos Clark, and the release of her and Oakes's estate from all liability to him upon a bond and mortgage for \$10,000 and a deed, given by Oakes to him, released him from all liability upon the assumption contained in the deed from Oakes and his father to him for the premises described in the complainant's mortgage. It will be remarked that the release was given after this suit was begun, but before the subpœna to answer was issued. Susan Clark, by her answer, sets up the release as a defence against the claim of personal liability made against her, and alleges that the release, though not delivered until the 10th of April, was, in fact, verbally agreed upon in March preceding. William Clark filed his answer, alleging that the clause of assumption contained in the deed to him was inserted by mistake by the person who drew the deed, and that his father neither intended nor intended that any such clause should be in the deed. He further sets up the release to his father, and insists that even if the assumption in his deed were such as equity would permit, and, he would not be liable to the complainant thereunder, because of the release by which his grantor was discharged from liability to indemnify Oakes's estate against the mortgage. In his answer, he filed a bill evidently designed as a cross-bill,

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in this suit, but which lacks most of the characteristics of such a pleading, and appears rather to be an original bill. Its object is relief against the assumption contained in the deed to him, and it prays a rectification of that deed by expunging the clause. As before remarked, it was designed as a cross-bill, but if intended as an original bill it is of such a character that, on motion, the court would have ordered that it stand as a cross-bill so far as the complainant therein was concerned. The issue which it tenders has been accepted by the complainant in the foreclosure suit, and the controversy is before me on its merits; and if any amendments were necessary to an effectual and conclusive disposition of the question which it raises, they would, under the circumstances, be made.

The proof is clear that the assumption clause in the deed of William was inserted by the draughtsman without any direction to do so from the parties, or any of them, and contrary to the intention of the grantors. It further appears that the deed was delivered merely as a gift (a wedding present) of the property subject to the mortgage, and without any consideration other than natural affection. Also that the grantee was not aware until after the beginning of this suit that the clause was in the deed; and further, that had he known it was there when the deed was tendered to him, he would not have accepted the deed with the clause in it; and that had he become aware, after he received it and before suit brought, that it was in the deed, he would have had it expunged. He is clearly entitled to the relief which he seeks, but of course no costs will be awarded to him.

As to the defence of Amos Clark under the release from the executrix of Oakes. There is no evidence of any want of good faith in that matter, nor is any bad faith even alleged. The proof is that the release and its terms were agreed upon before the original bill in this cause was filed. Moreover, there is no evidence that the parties to the release, or either of them, had, when the release was delivered, any knowledge that this suit had been or was about to be instituted. No subpoena had been issued, nor, as far as appears, had any notice of any kind been given them that the suit had been instituted or was about to be

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commenced. The filing of the bill was not of itself notice of the pendency of the suit. *Haughwout v. Murphy*, 7 C. E. Gr. 531. In good faith, and with no actual knowledge of the suit, Clark, in pursuance of the agreement made in March, paid Mrs. Oakes \$10,000, and released her and her husband's estate from liability on his mortgage for \$10,000 and interest. It is urged, on the part of the complainant in this suit, that there is no proof that Mrs. Oakes was the legal representative of her husband. But no proof on that head was necessary, for the bill itself states the death of Josiah Oakes, and that his widow, Susan A. Oakes, is the executrix of his last will and testament, and his sole legatee, and she prays a decree for deficiency against her to the extent of the proceeds received and not otherwise legally appropriated. There shall be no decree for deficiency against either of the Clarks.

ANNA C. EMERY

v.

THOMAS GORDON et ux.

A mortgage, given in 1875, payable in five years, was assigned by the mortgagee to complainant January 5th, 1876, and the assignment recorded February 16th, 1876. The bond and mortgage and assignment all remained in the hands of the mortgagee, as agent of the assignee, for the collection of the interest, until November 1st, 1877, during which time the interest and part of the principal were paid by the mortgagor to the mortgagee, who paid over the interest to the complainant, but none of the principal. After November 1st, 1877, similar payments were made to the mortgagee, who again paid over the interest, but not the principal.—*Held*, that the payments of the principal made to the mortgagee after the assignment, and while the instruments remained in his possession, must be credited on the mortgage; *aliter*, as to such payments, after they had been withdrawn from him by the complainant.

Bill to foreclose. On final hearing on pleadings and proofs.

Emery v. Gordon.

Mr. D. J. Puncost, for complainant.

Mr. A. Hugg, for defendants.

THE CHANCELLOR.

The defendants, Gordon and wife, gave their mortgage, dated July 14th, 1875, on property in Camden, to Barton Lowe, executor, to secure the payment of Gordon's bond to Lowe of that date, conditioned for the payment of \$3,500 in five years, with lawful interest, payable semi-annually, with proviso that on thirty days' default in the payment of the interest, the principal should become due. On the 5th of January, 1876, Lowe, by deed of assignment, assigned the bond and mortgage to the complainant. The assignment was duly recorded on the 16th of February, 1876. The bond, mortgage and assignment all remained in Lowe's hands up to the 1st of November, 1877, when they were withdrawn by the complainant, who took them into her own possession, and they were never afterwards, nor was any of them, returned to him. Gordon, while they were in Lowe's hands, paid the interest to him, and also \$1,600 of the principal, and paid him the interest up to January 14th, 1879, and \$900, also on account of principal, afterwards. Lowe paid the interest to the complainant, but never paid her any of the principal which he so received. He received the principal without her authority or knowledge, and never informed her that he had received it, but, on the other hand, paid over to her interest on the whole amount of the mortgage, not only up to November, 1877, but afterwards, and up to and including January 14th, 1879.

In paying her the interest after the papers were withdrawn from him he alleges that he did so as Gordon's agent. He left the state in May, 1879. When, in 1878, the complainant learned from Gordon that he had made payments on account of the principal to Lowe, and spoke to the latter about it, he denied that Gordon had done so, but said that the alleged payments were loans from Gordon to him, and not payments on account of the mortgage. The complainant early in January, 1878, sent through the post-office to Gordon a notification that no one was

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authorized to receive the principal or interest on the mortgage for her, and thereby required him to pay her in person. Both he and she resided in Camden. He swears that he did not, to his knowledge, receive the letter, and there is no proof that it came to his hands. On the 8th of July, in the same year, she again wrote to him, reminding him that the interest would become due on the 14th of that month, and requesting him to pay it to her in person, or, in case of her absence from home when he should call for the purpose, to her landlady. He received that letter. On the 10th of December following she again wrote to him, asking for a payment (to be made the next January, though it would not then be due) of \$1,000 on account of the principal, and reminding him that the interest would fall due on the 14th of January. She added that Judge Pancoast would collect her interest, and that she had put her business into his hands. This letter, also, Gordon admits that he received. He did not reply to it, however, until the 6th of January, 1879, nearly a month after it came to his hands, and he then merely said, referring to her request for the payment on account of principal, that he did not owe so much on the mortgage as she asked him for, and that if she wanted to know the particulars she should call on him before the 14th of January. It appears from his testimony that on receiving the two letters from her he called on Lowe and showed them to him, and the latter told him to pay no attention to them, adding that he (Lowe) was "the agent for the parties." Gordon says that when he made the payments to Lowe he considered Lowe the owner of the mortgage, and indeed the receipts given to him by Lowe after the assignment were not given as agent or attorney, but in Lowe's own name—in one instance as executor. From the time when the assignment was left for record Gordon was chargeable with notice that the complainant was the owner of the mortgage (*Rev. 708 §§ 32, 34*), and his payments to Lowe after that time, on account of it, could only be allowed on the ground that Lowe was the complainant's agent. That he was such agent up to November, 1877, she herself says. She testifies that she left the bond and mortgage in his hands for about two years after they had been assigned to her, in order that he might

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receive the interest, and nothing else, and she adds that he was her agent for that purpose, and that after the two years she got her papers from him. The assignment was made in July, 1875, and she took the papers out of his hands in November, 1877. While Lowe thus had possession of the bond and mortgage, Gordon could safely pay both principal and interest to him. The principal, indeed, was not due, but nevertheless Lowe was the complainant's agent, and as such had possession of the bond and mortgage, and payments made to him on account of the principal, under such circumstances, were binding on her. But those made to him after the bond and mortgage were taken out of his possession, were not. The letter of July 8th, 1878, substantially gave Gordon notice not to pay interest to any one else except the complainant in person, or, in case of her absence from home, to her landlady. Gordon was, after the assignment was left for record, charged with the duty of seeing to it that the person, whether Lowe or any one else (except the landlady), to whom he should make payment, was entitled to receive it. In fact, he never made any payment to Lowe as the complainant's agent, but, being unaware of the assignment, paid him as the mortgagee, and after he received the complainant's letters of July 8th and October 10th, 1878, he acted on Lowe's assurance that they were of no importance, and took Lowe's advice to pay no attention to them. Under the circumstances, however, he is entitled to the same protection (and no more) as if he had actually known of the fact of the assignment, of the fact that after the assignment was made Lowe was, up to November 1st, 1879, the complainant's agent, having possession of the bond and mortgage as such, and that on that date Lowe's agency ceased, and the bond and mortgage were taken away from him accordingly. Lowe, by gross fraud, obtained from Gordon, on account of the principal of the mortgage, \$2,500, which he has never paid over, and that money is hopelessly lost. As to \$1,600 of it, the defendants are entitled to protection, but as to the rest they are not. Both Gordon and the complainant are innocent parties, and the question is, which of them should bear the loss. The defence of ratification which is set up is by no means established. The

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weight of the evidence is against it. Up to January 14th, 1879, interest was paid, as before stated, on the whole amount of the principal of the bond and mortgage. After Lowe's departure from the state, which was in May, 1879, Gordon refused to pay interest on more than \$1,000 of principal, which he insisted was all that was unpaid on the mortgage. He paid \$35 for six months' interest on that sum on the 14th of July, 1879, and the bill was filed in August following. The principal was due, by the terms of the mortgage, on the 14th of July, 1880.

There will be a decree for the complainant for principal and interest, in accordance with the views above expressed.

P. VAN ALLEN WESTERVELT

v.

THEODORE W. FRECH et al.

On a note made by the complainant for the accommodation of the endorser, with the payee's (the defendant's) knowledge that it was made for accommodation, the defendant recovered a judgment at law. Afterwards, the defendant, without the complainant's knowledge or consent, took the endorser's notes, some of which were paid and others renewed and not paid, on which judgment was recovered.—*Held*, that the giving of time to the endorser, by taking his notes, discharged the maker from liability on the original judgment.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. W. Griggs, for complainant.

Mr. John Schomp, for defendants T. W. Frech & Co

THE CHANCELLOR.

The object of this suit is to protect the complainant against a judgment at law, recovered against him and his brother, Cornelius C. Westervelt, by Theodore W. Frech and Arthur A. Ten

Westervelt v. Frech.

Eyck (T. W. Frech & Co.,) October 5th, 1877, in the supreme court of this state, for \$2,650.11, upon a promissory note made by the complainant for the accommodation of his brother Cornelius, to be discounted for the latter by T. W. Frech & Co. The judgment being wholly unpaid, an arrangement was made between Cornelius and Frech, on the 10th of December, five days after the judgment was recovered, by which the former was to give to T. W. Frech & Co. his check on a bank in Jersey City for \$86.51, and his note, at three months, for \$2,700, endorsed by Michael Sandford, on the understanding and agreement that if the check should be paid on presentation, after October 17th, 1877, and one-half of the note at maturity, with a renewal at three months for the other half and interest, and the note given in renewal should be paid in full at its maturity, it should be in satisfaction of the judgment, but the judgment was "to be valid and binding until the payment of the note and check," according to the agreement. The check was duly paid; the note for \$2,700 was not. It was renewed as to \$2,600 of it; two notes being given therefor, one for \$1,400 at two months, and the other for \$1,200 at three months; the balance being paid in cash. The note for \$1,200 was paid at maturity. The other was not, but renewed. In November, 1878, the note last given in renewal thereof being unpaid, the holder of it, the Somerset County Bank, to which the firm of T. W. Frech & Co. had endorsed it, brought suit on it in the supreme court, against Cornelius C. Westervelt, Michael Sandford, and Frech and his partner, Ten Eyck, and recovered judgment thereon December 28th, 1878. After the judgment was recovered, Cornelius C. Westervelt and Sandford, by agreement with Frech, gave him two notes for \$600 each, and Cornelius C. Westervelt paid the amount of the interest in cash. These notes were given with a view to having them discounted by the Somerset County Bank, and the proceeds used for the payment of that judgment. They appear not to have been used at all. In March, 1880, an execution was, for the first time, issued on the original judgment, and it was levied on the property of the complainant. He then brought this suit for relief, on the ground that being a mere

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surety, and known to Frech & Co. to be such, and they having given an extension of time to Cornelius C. Westervelt upon that judgment, he is, in equity, thereby discharged from liability on the judgment. He alleges that he did not, until that time, know that a judgment had been entered against him, and he alleges, also, that during the time between the entry of the judgment and the time of the acceptance, by Frech & Co. of the before-mentioned note of \$1,200, in July, 1878, his brother was solvent, or, at least, had enough property to have enabled the complainant to indemnify himself therefrom if he had been compelled to pay the judgment against him; but that since the latter date both Cornelius and Sanford have been insolvent, and that if he is compelled to pay the balance due on the judgment against him, he will be without recourse for his indemnity, and will be compelled to lose his money.

The defendants insist that the fact that the complainant was a mere surety for his brother was not known to Frech, who transacted the entire business for his firm in taking the original note, recovering the judgment thereon, accepting the check and note given on the 10th of December (the receipt therefor was signed by him), and the rest of the business in connection with the claim. Frech says that the paper which Cornelius was to obtain and send to him to be discounted, was to be endorsed by the complainant; but, instead thereof, he received a note made by the complainant and endorsed by Cornelius. He does not say he supposed, or had any reason to think, that the note was not mere accommodation paper. The origin of the note was this: Cornelius owed the firm of T. W. Frech & Co. between \$600 and \$700 on a note given by him to them. Frech called on him for the money, but he could not pay it. In the course of the conversation which then took place between them, Cornelius asked him if he could obtain a loan for him; to which Frech replied that if Cornelius "would make good paper," he would try; and he says that Cornelius then said he would give him a note endorsed by P. Van Allen Westervelt, of Paterson. The note given to Frech to be discounted was, as before stated, made by the complainant and endorsed by Cornelius. Both Cornelius

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and his sons, who were present at the conversation, swear that what Cornelius said was that he thought he could borrow some good paper, and on Frech's asking whose paper it would be, he replied that it would be that of his brother at Paterson. There is no reason to doubt that Frech knew that the complainant was merely an accommodation maker. He says he regarded Cornelius as worthless, but he never made any application to the complainant to pay the judgment until after all his transactions with Cornelius, for the payment of it, were at an end. And yet he says it was on the strength of the complainant's pecuniary responsibility alone that he took the original note. In all the transactions in reference to the judgment after its recovery, he dealt with Cornelius as the principal debtor. He says, indeed, that the agreement between him and Cornelius, in pursuance of which he received the original note, was that the latter was to give him a note to be made by Cornelius and endorsed by the complainant, while the note which Cornelius gave him was not made by the latter, but by the complainant, and endorsed by Cornelius. He knew, however, that the paper which was brought to him was made as security for a loan for Cornelius. He says, narrating the conversation out of which the note came—

“He [Cornelius] asked me if I could not engineer a loan through for him; I told him if he made good paper, I would try; he said he was very short just then and would like to use \$2,500 or \$3,000; I told him if he would make me a good note for \$2,500 or \$3,000, and allow me to deduct my bill, I would discount the note for him myself; he said he would give me a note endorsed by P. Van Allen Westervelt, of Paterson; as to the responsibility of P. Van Allen Westervelt, he referred me to Mr. Hogencamp, of the Second National Bank of Jersey City, who lived close by him; and I told him if Mr. Hogencamp said the note was good, and he would allow me to deduct my bill, I would give him the money; he brought the note to me; I did not know P. Van Allen Westervelt's signature; instead of his bringing a note endorsed by P. Van Allen Westervelt, he brought me P. Van Allen Westervelt's note; I sent our bookkeeper to Jersey City with the note to show to Mr. Hogencamp; I took his note, and that is the note on which this suit [the suit in which the judgment was recovered] was brought,”

Cornelius swears that what he said to Frech was that he thought he could borrow some good paper; that Frech asked

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him "whose paper?" and he replied that it was the paper of his brother in Paterson, and that Frech said that if he would let him keep his bill out of it he would discount it for him, first ascertaining if it was good. He also says that in a day or two he received a telegram from Frech saying, "all right, send it along," and he obtained the paper and took it to Frech accordingly. His son, Charles S., testifies that his father told Frech that he could borrow the notes of his, the witness's, uncle in Paterson, or thought he could, and that Frech said he would inquire into the uncle's responsibility, and let the witness's father know. Cornelius, another son, says his father spoke of his, the latter's, brother's notes, and asked whether if he got his brother's notes Frech would discount them. He adds that he understood from the conversation that the notes were to be merely accommodation paper. The complainant, in his bill, says Cornelius applied to him to endorse his note for discount, for his accommodation, and that he, the complainant, drew the note himself, and instead of endorsing it, signed it as maker, for, as he says, no special reason, but because he thought that was "the proper way to draw a note when for accommodation." The note was made merely for accommodation and there was no understanding that the paper to be received by Frech for discount was to be business paper, but as before stated, on the other hand, it was to be paper on which the complainant was to be surety, made to secure a loan for Cornelius. The agreement of December 10th (made five days after the entry of the judgment on the original note), was an agreement by which Frech, for himself and his copartner, coplaintiff with him in the judgment, bound the plaintiffs in the judgment not to execute it, provided the check and note were paid according to the stipulation; that is, provided the check should be paid on presentation after the 18th of October, 1877, and one-half of the amount of the note paid at maturity (three months after its date, October 9th, 1877), and a renewal note made for the other half, three months, with interest, and the note given in renewal should be paid at its maturity. It is true, the agreement stipulates that the "judgment is to be held valid and binding until such payment of the note and check," but the effect of that

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ation is merely that the judgment shall stand as security in meantime. The rights of the plaintiffs in the judgment against the surety were not thereby reserved; nor were the note check taken merely as collateral security for the judgment. The plaintiffs in the judgment could, of course, have been restrained from proceeding on the judgment to recover the money due thereon, as against Corneilius, until after default in payment of the check and note according to the terms of the stipulation in that behalf. And if the surety had paid the judgment before such default, he could not have obtained indemnity under the judgment, for he could not have proceeded under it, since the complainant, by subrogation to whose rights alone he would have been enabled to use the judgment for the purpose, could not himself have proceeded upon it. It is an established principle that where the creditor, knowing the surety to be such, without his assent, and without reserving his rights as against him, gives time to the principal, the surety is *ipso facto* discharged from his liability; and that, too, if the time be given after a judgment recovered against both upon the contract; and it is also established that this doctrine applies where the contract is that of a maker of a negotiable promissory note made for the accommodation of the endorser. In the case in hand the firm of T. W. Frech & Co. lent to Cornelius C. Westervelt \$2,500, less the discount on a promissory note made for the accommodation and merely for the accommodation of the borrower. Having obtained judgment against both maker and endorser, the borrower, they gave the latter time without the assent or knowledge of the maker and without reserving their right to proceed against him. It was urged upon the hearing that the contract was made, or assented to, by an agent of the complainant, and the answer alleges that Sandford, the endorser, was recovered, v. to support the claim. The complainant is entitled to declaring him discharged from liability on the judgment the injunction will be made perpetual accordingly, but

Thorne v. Andrews.

FANNIE W. THORNE

v.

PURNELL W. ANDREWS et al.

A petition to set aside a master's sale in partition was dismissed, where an application to the master to adjourn the sale was made after the sale had begun; the price obtained for the premises was satisfactory; the master's discretion as to selling nine lots in gross, fairly exercised, and the petitioner was in laches in presenting his petition.

In partition. On order to show cause why sale should not be set aside. On petition.

Mr. C. A. Bergen, for the petitioners.

Mr. C. P. Stratton, for complainant.

Mr. E. A. Armstrong, for a purchaser.

THE CHANCELLOR.

Application is made to set aside the master's sale in this suit, on the following grounds: that a reasonable request for an adjournment, made by one of the petitioners, was refused; that the sale was a surprise on the petitioners, because, as they allege, it was understood between Purnell W. Andrews, one of the petitioners (who was acting for all of them), and the complainant's solicitor, that the property was not to be sold at a sacrifice; that the sale was conducted in a "mysterious" way, and not understood by the persons present; that the principal piece of the property, consisting of nine building lots, was sold as a whole, when it ought to have been sold in lots, and that the prices obtained for the property at the sale were inadequate. Purnell W. Andrews was present at the sale, and was able to protect the interest of himself and his copetitioners, by bidding on and buying in the property. He not only purchased none of it, but as

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to the piece containing nine lots, expressed himself satisfied with the price which it brought. Moreover, the sale took place on the 8th of January, 1881, and he did not file his petition until a month afterwards, and only four days before the day fixed by the master, in the conditions of sale, for the delivery of the deed. The property is in Camden, and Andrews lives in that city. The delay is not explained. An examination of the testimony satisfies me that the master acted fairly and discreetly in refusing to grant the adjournment, which, it should be stated, was not asked for until after the sale had begun. Nor is the allegation of surprise sustained. The conduct of the complainant's solicitor appears to have been frank and fair, and he seems to have taken pains to obtain the best price practicable, for the property. There is no ground for the objection that the sale was conducted in a "mysterious" way, or that it was not understood by the persons present. The prices obtained were not only not such as to induce the court to set aside the sale for inadequacy, but they appear to be such as, in view of the fact that the sale was by public auction, should be regarded as very satisfactory. The master used his discretion in selling the piece containing nine lots as a whole, and, it may be added, he appears to have exercised it very judiciously. One of the other pieces of the property was struck off at \$5, but the title was clouded, and it was bid in in behalf of the estate.

The order to show cause will be discharged and the petition dismissed, with costs.

ALICIA A. SMITH

v.

RICHARD SMITH.

On an application for temporary alimony and counsel fee, in a suit for divorce for extreme cruelty, it was argued that from the statements of the bill, the cruelty complained of was the result of the husband's insanity.—*Held, that*

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a wife is equally entitled to protection against extreme cruelty on the part of her husband, where his malevolence is the result of insane delusion, as where it springs from jealousy or hatred.

Bill for divorce for extreme cruelty. Motion for alimony *pendente lite* and counsel fees, and other provision for the conduct of the suit.

Mr. S. Tuttle, Mr. J. D. Bedle and Mr. C. Parker, for the motion.

Mr. J. W. Taylor and Mr. T. N. McCarter, contra.

THE CHANCELLOR.

The motion is made upon the bill, and the affidavits thereto annexed. The parties were married November 7th, 1854, and from that time up to the time, August 28th, 1880, when the complainant left her husband, they resided in Newark together. He still resides there, and carries on, as he has for many years past, a large and prosperous business as a jeweller in that city. When the complainant left her husband she went to Paterson, where she has ever since lived. She alleges that she was driven from her husband's house, and constrained to seek refuge elsewhere, by his extreme cruelty towards her. According to the bill, the cruelty consisted of (among other things) violent and threatening conduct, a violent blow which he struck her on the 4th of August, 1880, and a hideous charge of criminality which it is unnecessary now to particularize. It is urged, in opposition to the motion, that on the statements of the bill itself the defendant must have been insane when he committed the acts complained of. But not only does it not appear that he has ever been adjudged to be insane, but it appears by the bill that, as before stated, he is engaged in a large and successful business, and has property, including his investment in his business, to the amount of over \$50,000, all of which it seems he himself manages. From this fact it is a legitimate deduction that if he

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is insane at all, his insanity must be partial merely, and does not extend to his business faculties, nor affect him in his ordinary intercourse with society. A husband is, by law, required to support his wife, and if, by his extreme cruelty, he expels her from his house, he may be compelled to support her elsewhere. Nor is she required by the obligations of her matrimonial duty to abide with him when his cruel treatment of her through malevolence, whether the result of insanity or not, renders it dangerous to her life or health to continue to live under the same roof with him. It is sometimes difficult to distinguish between the malevolence which is the offspring of insanity and that which is the result of the sway of bad and unbridled passion. For example, common observation has taught the unreasonableness and inconsiderateness of jealousy in a sound mind, and its supreme and absolute control over its subject. Eminent judges have expressed an unwillingness to refuse the protection of the court to a wife against cruelty on the part of her husband, where the excuse offered is eccentricity or a peculiarly excitable state of mind, the result of past disease. Said Dr. Lushington, in *Dysart v. Dysart*, 1 Rob. E. 106, 116 :

“When I find conduct towards a wife likely to prove dangerous to her safety, but not in other cases, I shall consider it within my cognizance, whatever may have been the cause thereof, whether having arisen from natural violence of disposition, from want of moral control, or from eccentricity. It is for me to consider the conduct itself, and its probable consequences; the motives and causes cannot hold the hand of the court unless the wife be to blame, which is a wholly different consideration.”

And Sir Creswell Creswell, judge ordinary, in *Curtis v. Curtis*, 1 Sw. & Tr. 192, 213, after quoting with approbation the above language of Dr. Lushington, proceeds to say :

“If, indeed, an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that, the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion, which would be dangerous to a wife, then undoubtedly this court is bound to emancipate her from such peril.”

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It would not be proper or justifiable in this case, at this stage, to conclude that the defendant's conduct is the result of insanity or insane delusion, and therefore it is not necessary now to determine whether, if the cruelty complained of be shown to be the result of insane delusion in a mind in other respects sound, it would not be the duty of the court to relieve the complainant by a divorce from bed and board from the risk to which she would be subjected by living with her husband. Nevertheless, it is not out of place to say that it seems to me clear that a wife is equally entitled to protection, under our divorce law, against extreme cruelty on the part of her husband, where his malevolence is the result of insane delusion, as where it springs from jealousy or hatred. A distinction is to be made between such a case and a case where the husband is shown to be insane generally. In the latter case, the wife may obtain protection through appropriate proceedings to cause her husband to be declared a lunatic. A man may, as is well known, be mentally competent to transact all business, and still be the subject of insane delusion as to a particular individual. Or, as Lord C. J. Cockburn expresses it in *Banks v. Goodfellow*, *L. R. (5 Q. B.) 549, 560*:

"There often are delusions, which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life."

Where a man is capable of managing his estate and discharging all his duties towards every one else except his wife, whom he maltreats because of insane delusion as to her, rendering association with him by her unsupportable and unsafe, and perhaps even endangering her life, it would be irrational to deny her the protection of the law which accords to a wife a separate maintenance out of her husband's estate, when necessary to protect her from his brutality. The motion will be granted. The temporary alimony will be fixed at the rate of \$1,000 a year, payable in equal monthly installments, and to begin with the date of the filing of the bill, which appears to have been some months after the complainant left her husband. If it should be made to

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appear that (as was stated to be the case on the argument) there are unpaid debts contracted by the wife against her husband for her support, the amount of which ought, in justice, to be allowed him, on account of the alimony hereby ordered, the allowance will be made, but it does not appear so now. It is to be observed that the allowance hereby provided for does not cover the time between her departure and the filing of the bill. He was bound to support her during that period, and the practice of beginning the alimony with the commencement of the suit has arisen from the presumption that up to that time the wife was able to obtain her support from the husband. If the debts referred to are for the complainant's maintenance during that period, they will not, if they are not unreasonable, be considered in the alimony. There will be an allowance to the complainant of \$300 for counsel fees, and provision will be made for the payment of the expenses of the suit as it progresses.

HENRIETTA A. McCLUNG

v.

CHARLES A. McCLUNG.

A defendant discharged from imprisonment for contempt in disobeying an order, although he had not cleared his contempt, the chancellor being of opinion that the authority of the court had been vindicated in the imprisonment which the defendant had undergone.

Bill for divorce from bed and board for extreme cruelty.
motion to discharge defendant from custody for contempt.

Mr. A. Hugg, for the motion.

Mr. S. H. Grey, for the complainant.

CHANCELLOR.

of April, 1879, the defe

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adjudged to be in contempt of this court, and it was ordered that for his contempt he be committed to the jail of Camden county. The contempt was his refusal to obey an order in this suit requiring him to pay alimony *pendente lite* at the rate of \$10 a week. He was in default in the payment for many months. He had in fact paid nothing from August 1st, 1878. The order for the commitment was made on due notice and a full hearing. He now asks to be released from his confinement. He has not paid the alimony for non-payment whereof he was adjudged to be in contempt, nor anything on account of it, and he has paid nothing for the support of his wife and children since the 1st of August, 1878. He does not appear to have made any effort to pay anything. He has had property out of which he could have paid the alimony. After he was committed he conveyed to his mother valuable real estate, consisting of houses and lots in Philadelphia which he inherited from his father, and he appears also to have conveyed to her land in Camden belonging to him. When he was committed he owned a right for his life to the rents of two other houses and lots in Philadelphia, which he had previously conveyed to two of his children, subject to that right. He appears to have deliberately made the conveyance to his mother, and for no valuable consideration; and it seems quite evident that he made it to defeat the order for alimony. There is no evidence that he could recover the property from his mother, if he were required to do so as terms of his release. He has not cleared his contempt, but I think the authority of the court which he set at naught has been vindicated in the imprisonment which he has undergone. I will therefore discharge him on his transferring to a receiver the right to rents before mentioned, in order that those rents may be applied under the order of this court to the payment of alimony ordered or to be ordered in this suit, or other payments which he may be required to make in this cause; and he will be required to pay the costs of the order of commitment, and also a fine of \$5 to the clerk of this court for the use of the state, according to the provisions of the statute. *Rev. 124 § 103.*

Frome v. Freeholders of Warren.

THOMAS B. FROME et al.

v.

THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY
OF WARREN.

An injunction will not be dissolved merely because the complainant, in his bill, has unintentionally misstated some of the facts on which his claim to relief is founded, such misstatements not affecting the merits.

Bill for relief. Motion to dissolve injunction. On bill, answer and affidavits.

Mr. N. Harris and *Mr. J. G. Shipman*, for the motion.

Mr. L. De Witt Taylor, contra.

THE CHANCELLOR.

The bill is filed for relief against a judgment at law, recovered by the defendants against the complainants, Thomas P. Frome, John F. Van Sickle and William P. Hance, and Robert P. Ramsay, now deceased, on the 31st of December, 1879, in the Warren circuit court, upon a bond given by the defendants in the judgment to the defendants in this suit in May, 1877, with, and as sureties for Samuel Frome, on his official bond, as steward of the Warren county poor-house. His term of office, in respect to which the bond was given, was one year from the 12th of May, 1877. The condition of the bond appears to have been that he should faithfully perform his duties as such steward, and render a true account of the property and money of the establishment which might come to his hands or possession. The bill alleges that the judgment was recovered not on that bond (as to which, and the suit brought by the defendants in this suit thereon, the bill is silent), but on an alleged like official bond said to have been given by the same persons with, and as sureties for, Frome,

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as steward for the year beginning May 12th, 1876. The complainants deny that any such bond as that last mentioned was ever given, and allege that when suit was brought upon such alleged bond, Frome undertook to attend to their defence in the action for them, and employ counsel for them accordingly. The bill was evidently based on the supposition that the judgment was entered in that suit, but it appears by the answer that it was not, but was founded on the bond given in May, 1877, upon which suit was brought at the same time and in the same court as on the other bond said to have been given for the year next preceding. It is not only not claimed by the answer or by defendants counsel in argument, that the sureties were liable under the bond given for the year commencing May 12th, 1877, for default in accounting for money received in the year next preceding, but the contrary is conceded, and yet it appears very clearly that the judgment was entered for default, in accounting for money received from one John F. McClellan, in February, 1877, and therefore within the preceding official year. The declaration in the suit, according to the answer, alleged for breach, Frome's failure to account for money received by him between the 11th of May, 1877, and the 12th of May, 1878. The suit brought on the bond alleged to have been given in May, 1876, was discontinued, and the other was proceeded in. An attorney appeared in the latter suit, for the principal and sureties, and pleaded for them, and there was a trial, by consent, before the judge, without a jury (a jury being waived), and judgment was entered for a sum agreed upon between the plaintiffs in the suit and the attorney for the defendants therein. The answer also alleges that a rule to show cause why the judgment should not be opened was taken in behalf of the defendants in that suit, or some of them, and was discharged because it was not pursued. But it appears by the answer that the rule was taken, on the supposition that the judgment had been entered on the alleged bond of May, 1876, which the answer says was not true. The complainants insist that the attorney who appeared for the defendants in the action, which was prosecuted to judgment, was not retained by them therein, and had no authority to consent to

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judgment, and that the amount of the judgment was the result of a trial, but a settlement between the plaintiffs in the action and Frome, to which the sureties were not a party, and by which they were not bound. If the answer is true, the whole history of the case is not set forth in the bill, and the bill is founded on a false supposition as to the basis of the judgment, but if so, there is no evidence that there was any intentional concealment or suppression. The case is one in which the injunction should be retained till the final hearing. The motion, therefore, will be denied, but without costs.

SARAH J. CARLTON, executrix &c.,

v.

THE VINELAND WINE COMPANY.

A bond and mortgage on lands, and also a bill of sale of chattels, were given to secure the payment of a debt.—*Held*, that parol evidence which was inconsistent with the terms of a contemporaneous agreement in writing between the parties, in regard to the disposition of the mortgaged chattels to pay mortgage, was incompetent.

Bill to foreclose. On final hearing on pleadings and proof.

Mr. L. Newcomb, for complainant.

Mr. W. A. House, for defendant.

debtor's mortgage debt
Hans C

Carlton v. Vineland Wine Co.

Thomas J. Carlton, the complainant's testator, in November, 1878. When they were given, an agreement in writing, under seal, was made and delivered by and between the company and Carlton, by which, after reciting that the company had made the bill of sale to Carlton for the wine and casks (which it was thereby stated were then set apart to him in the cellar of the company), as security for the payment of the mortgage debt (\$8,000) in eighteen months from that date, with interest, it was agreed that the wine was to be stored and taken care of by the company free of expense, for the eighteen months, unless it should be sooner sold, and that Alexander W. Pearson, president of the company, should be, and he was thereby appointed, irrevocably, the agent of Carlton for the eighteen months (provided he should act in accordance with the agreement) to sell and dispose of the wine in such quantities as he might choose, and, as fast as it should be sold, to pay to Carlton the sum of sixty-eight cents per gallon therefor, or secure the payment thereof by approved security before the wine should be removed from the cellar; that Pearson might reserve out of the sales the excess over and above the sixty-eight cents per gallon for the company as its compensation for storing, selling and taking care of the wine. And Pearson thereby agreed for the company to take care of and keep the wine up to its then standard and not to allow it to deteriorate in value, and also to use all diligence in selling it. And it was thereby agreed that Carlton should have free access to the wine at all reasonable times, for the purpose of inspection, and that as soon as enough of it should be sold to pay the debt and interest the rest should be reconveyed to the company. It was also expressly agreed that the wine should be insured to the amount of \$8,000, and the loss made payable by the policy to Carlton. The defence set up by the answer is that it was agreed between the parties that the company should, if it should not be able to sell the wine in the eighteen months, have such further time as would be reasonably necessary for the purpose, and that Carlton, in June, 1879 (before the eighteen months had expired), surreptitiously got possession of the cellar, and forcibly excluded Pearson from it, and thenceforward refused to permit

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him to take care of the wine or to sell it, denied his right to sell at all, and would not permit him to show the wine to persons desiring to purchase, and would not permit it to be inspected at all by, or shown to anybody, prevented Pearson from carrying on the legitimate business of the company, and gave him a notice dated May 13th, 1880, revoking the authority to sell given by the agreement, and forbidding him to remove, handle or dispose of any of the wine. The answer claims damages to the amount of \$4,000 for injury to the wine by the before-mentioned refusal of access to it, and asks for further time to sell it to raise the money which the court may determine is equitably due on the mortgage. The proof does not sustain the answer. It appears that Pearson was not at any time denied access to the wine, but, on the contrary, had free access to it at all times, and was fully at liberty to take all necessary and proper measures to preserve it. It also appears that he was never prevented from carrying on the business of the company on the premises, was never prevented from showing the wine, and that inspection was never denied to persons proposing to purchase; that Carlton, for the protection of the property against theft, was compelled to keep a watchman on the premises, and that his executrix, in the spring of 1880, was compelled to get the property insured at the expense of the estate, and in November of the same year was compelled to buy in the mortgaged real estate at a sale thereof for the unpaid taxes of 1879 thereon; that Carlton was willing, while the agency lasted, that Pearson should sell any quantity of the wine from any cask, provided he would take care of the remainder in the cask, and keep it in good condition, and that Carlton did not give the notice of revocation until July 16th, 1880, almost two months after the expiration of the period of eighteen months. It is further proved that the wine is all in good condition except one cask, which was spoiled by Pearson's drawing eleven gallons out of it for his own purposes, in November, 1879, and supplying their place with sweetened water. All the evidence on the subject of the verbal understanding alleged to have been had before and when the agreement was made in reference to allowing further time beyond

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eighteen months for the sale of the wine is, for obvious reasons, wholly incompetent. The witnesses to it, Mr. son and Mr. House, say the understanding was that if the teen months should prove not to be long enough, the time payment would be extended until the wine should be sold. In the first place, the mortgage money is made payable in teen months, and the contemporaneous agreement in writing provides that the president of the company shall, for the same purpose, have power to sell the mortgaged chattels to pay off the mortgage. In the answer, it is said that when the bond and mortgage and bill of sale were given it was understood and agreed that the bond and mortgage were not to be paid until the proceeds covered by the bill of sale could be sold. All the evidence on this subject is parol testimony, and is in contrariety to the bond and mortgage and written agreement, and is therefore incompetent. *French v. Griffin*, 3 C. E. Gr. 279. There will be decree in accordance with the views above expressed.

EDWARD G. BROWN

v.

PETER BALEN et al.

Where a bill alleged that a deed was given merely to secure a debt, and answers admitted that the grantors made a certain deed in writing, of date and of such purport and effect as in the bill mentioned and set out—*Held*, not to be such an admission of the nature and effect of the deed as to preclude all inquiry on the subject.

Complainant held a mortgage on an undivided two-thirds interest in certain lands, to secure debts owing to him by the two holders of that interest. He induced the owner of the remaining third to join in an absolute conveyance of the premises to him, he agreed to personally assume two prior mortgages on the land.—*Held*, that he could not afterwards have such assumption expunged from his deed, on the ground of fraud or mistake, and have such deed declared a mere security for the payment of the debts of the two grantors.

Brown v. Balen.

Bill for relief. On final hearing on pleadings and proofs.

Mr. F. Bergen, for complainant.

Mr. N. Runyon, for defendants.

THE CHANCELLOR.

The bill is filed to reform a deed dated March 20th, 1877, given by Charles A. Hunter, William J. Leeds, and Martin M. Thorn, to the complainant, Edward G. Brown, for land in the city of Plainfield. The rectification sought is the expunging of the following clause :

“This conveyance is made subject to two mortgages now on said premises, one held by Peter Balen for seven thousand dollars, the other held by Charles Hyde for four thousand five hundred dollars, which, with the interest due thereon, the party of the second part is to assume and pay, as a part of the consideration money herein mentioned.”

The deed expresses a consideration of \$12,500. The ground stated in the bill for the relief sought, is, in brief, that the deed was in fact a mortgage, and made and taken only as such, to secure an existing indebtedness, and that the clause in question was inserted without the complainant's knowledge or consent, and by mistake of the scrivener, or fraud on the part of the grantors. The bill gives the following account of the giving of the deed : that at the time of the making of the deed, Leeds and Hunter were, and for a long time prior thereto had been, and at the filing of the bill still were, indebted to the complainant in the sum of \$50,000, or thereabouts, which he had from time to time lent to them ; that prior to the making of the deed, and after that indebtedness had accrued, it was agreed between him and them that they should give him such security for the indebtedness as they, or either of them, were able to give or furnish ; that in pursuance of such agreement they gave him the deed in question, together with certain mortgages and other deeds for that purpose ; that at the time or times of the delivery of those deeds, it was expressly agreed and stipulated between them

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and him that the deeds, and each of them, and the property therein conveyed, and the mortgages, should be held by him as security for the payment of the money due to him as before mentioned, and in no other manner, and that upon the payment of the money the deeds should be void, and the property described in them reconveyed by him to the grantors or parties named by them, and the mortgages canceled. The bill further states, in the same connection, that at the time of the making and delivery of the deed in question the complainant held the bond of Leeds and Hunter, dated December 7th, 1875, for \$15,000 and interest, secured by a mortgage on two undivided thirds of the land subsequently conveyed to him by the deed, which mortgage was never recorded; that the bond and mortgage were never surrendered or delivered up, but are still held by him; that they were given to secure part of the before-mentioned indebtedness, and that he was not satisfied with a mortgage upon two-thirds of the property, and demanded of them that they should give him security on the whole of the land, and, it is added, the conveyance in question was made in compliance with that demand. It is to be observed that one of the grantors, Thorn, who was the owner of an undivided third of the property, was not indebted to the complainant. The answers of the defendant deny expressly and explicitly that the clause sought to be expunged was inserted without the complainant's knowledge or consent, or by fraud or mistake.

At this stage, it will be convenient to dispose of a point made and insisted upon by the complainant, that inasmuch as the bill alleges that the deed was given for security, and the answers all admit that the grantors, Hunter, Leeds and Thorn, and their wives, "made and executed a certain deed, or instrument in writing, of such date and of such purport and effect, as in the complainant's bill is mentioned and set forth," this is an admission of the fact that the deed was made merely as and for a mortgage, and precludes all inquiry on the subject. But that position cannot be maintained. The bill sets forth the deed *verbatim*, and the admission under consideration is merely that the instrument was given, and without admitting or denying that

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it was exactly as stated in the bill, conceding that it was indeed substantially so.

The proof is that the deed was taken as an absolute conveyance of the property. The testimony of the complainant on this point is subject to much criticism. He at first says that the proposition to convey to him came from Leeds and Hunter, who were moved to make the conveyance by the pecuniary difficulties they were in; that he never read the deed and did not think it worth recording. To the question "How did you happen to get that deed?" he answers:

"They wanted to give it to me; they were getting into some trouble with some debts that they owed, and they thought they had better give me a deed of it; I don't know that I ever read it over; Mr. Hunter might have read it to me; I don't remember his ever reading it, but still he might have done so; I did not have it recorded, because I did not think it worth recording; I knew that other creditors of Leeds and Hunter were pressing them for money at the time the deed was given."

Now this is not only in contrariety to his subsequent admission in his testimony, that he found fault because the mortgage for \$15,000 was not on the whole property, and they said they would give him a deed for the whole, but it is in direct conflict with the statement of the bill as to the origin of the deed. The bill says that he was not satisfied with a mortgage on two-thirds of the land, and demanded of Leeds and Hunter that they should give him security upon the whole of the land, and that the deed was made in compliance with that demand. In this connection it may be remarked that in his testimony he says he cared nothing for the fact that the mortgage was only on two-thirds of the property, and that he considered the mortgage as good as the deed, for there was, in his judgment, nothing in the property over the Balen and Hyde mortgages. But the letter written by him to Mr. Hyde, dated April 5th, 1877 (the deed was made in March of that year), is cogent and conclusive evidence as to the character of the conveyance, and is proof that he regarded it as a deed for the land to him as the purchaser thereof, and that under it he would be the absolute owner of the property. It is as follows:

Brown v. Balen.

"I have purchased from Messrs. Leeds and Hunter, and Martin M. Thorn, the property on Water street and Westervelt avenue, Plainfield, subject to two mortgages of \$7,000 and \$4,500, respectively, the latter held by yourself, and the accrued interest on the same, provided there are no other claims against the property. I have been very busy, but just as soon as I have the title examined and find it all right, I will see that the interest is satisfactorily adjusted.

The evidence shows that the complainant sought and obtained the conveyance as a deed absolute, and that he insisted upon having it because he could thus acquire the interest of Thorn in the ownership of the property. Hunter testifies that the complainant said to him that this property was the only one Leeds and Hunter had which was worth anything, and he wanted them to get him a deed for the whole of it; that Hunter told the complainant that they could not do that, that Thorn would not give up his interest. He also swears that in a subsequent conversation he told the complainant that if he, Brown, would assume the responsibility of the mortgages on the property (referring to the Balen and Hyde mortgages), he thought Thorn would give up his interest, and he adds, "Mr. Brown consented to that and said that he would take it and be responsible for the claims [meaning the two mortgages] on it, and pay up the interest right away." He says he saw Thorn on the subject, and, in view of the assumption, the latter consented to convey his interest to Brown. He further testifies that it was perfectly understood between the complainant and himself that the former's assumption of the mortgages was the consideration to be given to Thorn for giving up his interest in the property. He swears also that the complainant requested him and Leeds to get him a deed for the property, and adds, "not as security; he wanted the property absolutely." That the complainant agreed to assume the mortgages is positively sworn to by Hunter, who conducted the negotiation of the transaction for himself and Leeds. Thorn, as before stated, owed the complainant nothing. He did not see or communicate with him, except through Hunter, in the transaction. It is proved that the consideration of his conveyance of his interest in the property was the complainant's assumption of the Balen and Hyde mortgages, and that alone. As to him,

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then, there is no pretence either of mistake or fraud, and as to Hunter and Leeds, the evidence establishes none. The complainant knew the contents of the deed when he accepted it. Hunter swears that the complainant read it in his presence, and after reading it, said that before he accepted it, he wanted to know whether Hyde's mortgage could stand, and when Hunter assured him that it could, he refused to take his word for it, but went out that day from New York to Plainfield, and saw Mr. Hyde on the subject. After seeing Hyde, he said he would take the property. The complainant, while he denies that he read the deed himself, admits that Hunter may have read it to him. The complainant has failed to establish his right to the relief which he seeks. The bill will be dismissed, with costs.

JOHN GILL, surviving executor &c.,

v.

HARRIET ROBERTS et al.

1. A testator directed his executors to divide the income from his estate as follows: one-third to his wife; one-third to her then unborn child, if it should live, and the other third to his son Benjamin; that if either child should die or the unborn one should not be born alive, the survivor should receive the other's share; that if both children should not attain twenty-one, or should die without leaving lawful issue, their estates should go to testator's brother David's children, equally; that the share of each child should be paid to him on his attaining his majority, and they should also receive their mother's share at her death.

Testator died in 1829; his posthumous child was born alive, but died in infancy in 1830; Benjamin attained his majority, and died in 1853, unmarried, without issue and intestate. Testator's brother David had two children. The widow died in 1879.—*Held*, that David's children took the share left to the widow, not under the will, but as next of kin of Benjamin.

Bill of interpleader. On final hearing.

Mr. A. C. Scovel, for complainant.

Mr. A. Browning, for defendant Samuel E. Clement.

Gill v. Roberts.

THE CHANCELLOR.

Jacob Roberts, late of Gloucester county, deceased (he died April 27th, 1829), by his will of April 24th, 1829, after certain bequests, directed his executors to sell his undivided interest in a specified tract of land, and then directed them to sell all the remainder of his estate, real and personal, as soon as they might think best, and directed that then, after paying all his just debts, they should put the balance of his estate at interest; and he disposed of the annual interest therefrom as follows: his then (second) wife was to receive one-third in lieu of her dower, and her unborn child, if it should live, was to receive a third, and the testator's son Benjamin (then a minor), the other third. And he provided that if either of his children "should die," or his wife's child should not be born alive, the "survivor" should receive the other's share, and if both of the children should not live to attain to majority, or should die without leaving lawful issue, their "estates" should go to his brother David's children, in equal shares. And further, that when his, the testator's, children should arrive at majority they should receive their thirds, principal and interest, and also their "mother's" (his widow's) share of the principal at her death, but not before; but if either of them should die, the survivor should receive the other's share, and if neither of them should live to that period, their shares should go to his brother David's children, or the survivor of them. The testator's wife's child was born alive, but died in infancy, May 17th, 1830. Benjamin, the testator's eldest child, lived to attain his majority and died January 21st, 1853, unmarried, without issue and intestate. The testator's brother David had two children, John K. Roberts and Mrs. Clement. The latter died in 1858 leaving a husband (still surviving) and two children. Her husband is her administrator. The testator's widow died in 1879. John K. Roberts died in 1871, intestate, leaving a widow and children. The question presented is whether Mr. Clement is entitled to the share of his wife in the third of the testator's estate, of which his widow was to have the interest. Benjamin, when he died, was entitled under the will to the principal of the fund, subject to the right of the widow to

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the interest of it for life. When he died, Mrs. Clement and John K. Roberts, her brother, became entitled to it in like manner as his next of kin. They did not take under the will, but as next of kin of Benjamin, their cousin. The fund was personal property. On Mrs. Clement's death her husband, *jure mariti*, became entitled to receive her share of it, and he is entitled to have it paid to him as her administrator. The share of John K. Roberts is of course distributable, according to the statute of distributions, among his widow and children.

EZEKIEL E. BONHAM et al.

v.

ANN BONHAM et al.

A testator gave to his wife the use and income of his house and lands, for her life, and directed his executors to supply her out of his estate with everything that she might need or desire for her comfort, sustenance and happiness. He then gave a specific legacy to S.; several pecuniary legacies to others, and a devise of his house and lands, after his widow's death, to the trustees of a church, as a parsonage, on certain conditions.—*Held*,

(1) That the executors must resort to the principal of the personalty, for the widow's support, if the income thereof be insufficient.

(2) That the payment of the general legacies must be postponed until after the widow's death, and would be subject to ratable abatement if there should be a deficiency.

(3) That the specific legacy must be paid now and without abatement.

Bill for construction of will and directions to executors.

Messrs. Voorhees & Large, for complainants.

THE CHANCELLOR.

William Bonham, deceased, late of Hunterdon county, died in March, 1872, leaving a last will and testament, which has been

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ed by the complainants, the executors thereof appointed. bring this suit for construction of the will, and for direction in the discharge of their duty as executors in that connection.

By the will, the testator first directed that all his just and funeral expenses should be promptly paid by his executors, and that the legacies should be discharged as soon as circumstances would permit, and in the manner directed by the will.

He then gave to his wife all his household furniture which she might need or choose to select, for her use, and he gave her the use of one cow. Also the occupancy, use, enjoyment and income of his dwelling-house and the land and its appurtenances, to have and to hold the same to her for during the term of her natural life; and he thereby authorized and directed his executors to provide for and supply her out of his estate, with everything that she might need or desire for comfort, sustenance and happiness. He then gave to Rebecca Varford \$1,200 and his gold watch, and a bed and bedding, and requested that she would continue to live with his wife during her lifetime, if her health and circumstances would permit. He then gave to John Sutton (his nephew) a bond and mortgage of \$530; to his three nieces, Dentilia Sutton, Mary Sutton and Sarah Hunt, and his nephew, William B. Sutton, \$200 each; to his four persons, children of his deceased nephew, John Bonham, \$100 each, as they should become of age, and in case of the death of either of them before arriving at lawful age, the legacy given to either of them was to go to the survivors of them; to two persons, children of Uriah Bonham, deceased, he gave \$200; to the first one, a daughter of Uriah Bonham, and to another, a son of Uriah, he gave \$100; to two persons, daughters of Isaac M. Ser, deceased, he gave \$200 each, on their arriving at lawful age, and provided that in case of the death of either before that time, the survivor should take both legacies; and he gave to a son of Joel W. Salter \$100, on his attaining to his majority. The testator then made the following devise:

After the decease of my wife, I give, devise and bequeath my dwelling-house and lot, containing one acre of land, as originally purchased by me of

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Joel W. Salter, and all its appurtenances, to the trustees of the Rosemont Presbyterian Church, with this object in view: to assist in building up the church and to help in advancing the Redeemer's kingdom on earth; the same to be used as a parsonage or a home for the minister of the aforesaid church, to have, and to be held by the said trustees, or their successors in office, so long as there shall be sufficient interest manifested on the part of the congregation and friends of the aforesaid church to warrant the assurance that the gift is appreciated in the proper spirit: but, should they from any cause neglect to have a minister for the space of one year, then the whole claim to be forfeited. And furthermore, if, at the expiration of ten years of faithfulness on the part of the minister and people, as above directed, there should not be a strong evidence of spiritual prosperity and an encouraging increase in church membership, and a fair prospect of benefiting the community in general, then, in such case, this bequest shall be withdrawn by my executors, who shall proceed to advertise and sell the same according to law, the proceeds to be equally divided between Ezekiel E. Bonham and Rebecca C. Warford."

He then directed that the rest of the land be sold after the death of his wife, and gave all the residue of his estate to Ezekiel E. Bonham and Rebecca C. Warford.

The personal estate amounts to \$5,735.58, and the interest of it has, in some years since the testator's death, proved insufficient to properly support his widow, even in the most prudent and economical manner, and her increasing infirmities (she is about ninety-one years old, and very lame and nearly blind) will require that all the interest and income of the estate, if not part of the principal, be expended for her comfortable maintenance. Some of the legatees have demanded payment of their legacies and threaten suit. The bond and mortgage bequeathed to John Sutton remain in the hands of the executors. The bill states that the Rosemont Presbyterian Church has had no pastor for the last ten years, nor have any services been held in their meeting-house, under the organization known as the Rosemont Presbyterian Church, for at least ten years past, and that during all that time, with perhaps a single exception, the meeting-house has remained closed, and the congregation virtually disbanded, although there "remain" (presumably, from a former full board) two gentlemen, who act as trustees thereof. The corporation is not made a party to this suit, though two persons are, as trustees of the church. There is no answer, and there is no proof in the

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cause, but the questions are submitted on the part of the executors alone ; there being no appearance on the part of any one else ; and on the allegations of the bill, merely.

The questions submitted are, Whether the general legacies are payable before the death of the testator's widow ; whether the gift of the bond and mortgage to John Sutton takes effect immediately (the debts have been paid), or is to be postponed until after the death of the widow, and the interest thereof, in the meantime, applied to her support, if necessary ; whether the executors, if the general legacies are not to be paid until after the widow's death, are at liberty to expend the principal, or any part of it, if necessary for the widow's support ; whether the general legacies will, if there be not enough to pay them in full, abate ratably ; and whether the devise to the church is valid.

The testator authorizes and directs his executors to "provide for and supply his wife out of his estate, with everything that she may need or desire for her support, sustenance and happiness." This provision is in the form of a direction to his executors, whom it charges with a duty which is to be discharged notwithstanding it will be necessary to expend more than the annual income of the personal estate to do it. If, therefore, the annual income is insufficient for the proper performance of the duty the executors should apply so much of the principal as may be necessary for the purpose. It follows that the payment of the general legacies is to be postponed, under the circumstances of the case, until the death of the widow, and if the personal estate shall then prove insufficient to pay them in full, they will abate ratably. *Titus v. Titus*, 11 C. E. Gr. 111. The gift of the bond and mortgage to John Sutton is a specific legacy, and is not subject to abatement. Nor is there any ground for holding that the enjoyment of it is to be postponed until the death of the widow. The devise to the trustees of the church does not take effect until the death of the widow. There is not only no necessity for passing upon it at this time, but it would not be proper to do so.

Thompson v. Fisler.

WILLIAM J. THOMPSON et al.

v.

SAMUEL F. FISLER et ux. et al.

A defendant to a creditor's bill, after having been admitted as a co-complainant, may have the conduct of the cause committed to himself, on the ground of great delay on complainant's part, and on terms as to indemnifying complainant against future costs in the cause.

Creditor's bill. Motion to give to creditor, who has, on application, been made a party, the conduct of the cause because of the delay of the complainants in prosecuting it.

Mr. T. E. French, for the motion.

Mr. S. M. Dickinson, contra.

THE CHANCELLOR.

The bill was filed by the complainants as creditors of Samuel F. Fisler, in behalf of themselves and all others of his creditors who should come in and contribute to the expenses of the suit.

NOTE.—Whenever the complainant delays his suit unreasonably, its prosecution may be committed to any other party in the cause, whether complainant or defendant, as in case of a creditor's bill (*Powell v. Walworth*, 2 Madd. 183 (436); *Price v. North*, 2 You. & Coll. 628); although not interested in the whole of the decree (*Edmunds v. Acland*, 5 Madd. 31. See *Innes v. Lansing*, 7 Page 583); or an administrator's suit (*Fleming v. Prior*, 5 Madd. 423; *Williams v. Chard*, 5 De G. & Sm. 9; *Hutchinson's Trusts*, 1 Dr. & Sm. 39); or next of kin, (*Sims v. Ridge*, 3 Meriv. 458); or in proceedings for an account, (*Hallett v. Hallett*, 2 Paige 22; *Alvanley v. Kinnaird*, 8 Jur. 114); or in prosecuting a reference (*Quackenbush v. Leonard*, 10 Paige 131. See *Warren v. Shaw*, 43 Me. 429; *Brosard v. Lester*, 2 McCord Ch. 419).

But good cause must be shown (*Jendwine v. Agate*, 5 Russ. 283), and the order is appealable (*Wyatt v. Sudler*, 5 Sim. 450).

For proceedings after the order, see *Bennett v. Baxter*, 10 Sim. 417.

Thompson v. Fidler.

petitioner, a judgment creditor, was made a defendant, and duly subpoenaed to answer. The bill was filed in March, 1877, and the subpoena was returnable in April following. All the defendants but two, who were non-residents, were served. As to them, the usual proceedings by order of publication were taken, and they were called upon to answer on or before June 1, 1877. No further proceedings on the part of complainant, except the taxation on the 5th of June, 1877, of costs as incurred, were taken in the cause. In February, 1881, the petitioner applied to be admitted as a complainant, and it was so ordered. He now asks to be permitted to have the conduct of the cause committed to him on such equitable terms as the court may see fit to impose. The application is based on the delay for most four years, on the part of the complainants, to proceed in the suit. It does not appear that their claim has been satisfied. No decree of dismissal was ever entered. While it is true that the petitioner would be at liberty to file a bill for himself, it appears to me to be clear that under the circumstances of the case, he is at liberty to proceed with the prosecution of this suit, in which, by the invitation of the complainants, he has become a party complainant with them. It is indeed established that a petitioner who files such a bill has complete and absolute dominion over it until decree, and he may have the bill dismissed on

complainant cannot dismiss his bill to the prejudice of a defendant, and his appearance (*Bank of South Carolina v. Rose*, 1 Rich. Eq. 292; *Bethia v. Gay*, Cheves Eq. 93; *Hanks's Case*, Id. 203, 211; *Ancker v. Levy*, 3 Strobb. 211; *McClain v. French*, 2 Mon. 147; *Hall v. McPherson*, 3 Bland 529; *Allen v. Allen*, 14 Ark. 666; *Wilder v. Boynton*, 63 Barb. 547; *Pacific Co. v. King*, 7 Abb. Pr. (N. S.) 37; *Stew. N. J. Dig. Equity V (e)*. But see *Bullock v. Zilley*, 1 Hal. Ch. 77; *State Bank v. Bell*, 3 Hal. Ch. 372; *Smith v. Smith*, 232; *Kean v. Lathrop*, 58 Ga. 355).

One of several complainants cannot move to dismiss (*Fagan v. Fagan*, 15 335); but one defendant may (*De Luze v. Loder*, 3 Edw. Ch. 419).

Dismissal will not be ordered where complainant's delay was caused by defendant (*Person v. Nevitt*, 32 Miss. 180; *Dixon v. Rutherford*, 26 Ga. 153; *De v. O'Farrell*, 5 Rob. (N. Y.) 640; *Doyle v. Devane*, Freem. Ch. 345; *Meyer v. Filer*, 24 Mich. 241. See *Norton v. Kosboth*, Hopk. 101; *Bigelow v. Bennett*, 9 C. E. Gr. 115; *Warren v. Shaw*, 43 Me. 429; *Eddings v. Gillespie*, 548; *Gilbert v. Campbell*, 1 Hannay 474).—REP

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receiving satisfaction for his claim and the costs of suit. 1 *Dut. Ch. Pr.* 235 ; *Innes v. Lansing*, 7 *Paige* 583 ; *Pemberton v. Toham*, 1 *Beav.* 316 ; *Handford v. Storie*, 2 *Sim. & St.* 196 ; *W'o v. Westfall*, *Younge* 305 ; *Mattison v. Demarest*, 1 *Rob. (N.* 717 ; *McDougald v. Dougherty*, 11 *Geo.* 570 ; *Stephenson Taverners*, 9 *Gratt.* 398 ; 2 *Barb. Ch. Pr.* 169. And the defendant may, before decree, obtain a dismissal on those terms. But such absolute dominion over the suit cannot be exercised by the original complainant alone if there be other complainants. In such case, if the defendant debtor would obtain a dismissal, he must satisfy all of them. If before decree, while the suit is still pending, a creditor sees fit to come in, and asks to be made a complainant, contributing to the expenses of the suit, I do not see on what principle his prayer can be denied. And when he has taken his place as a co-complainant, he should, of course, be at liberty to proceed with the prosecution of the suit, if the original complainant unduly delays. A creditor who is permitted to come in as a co-complainant in such a case as this, is authorized to prosecute the suit. *Strike's Case*, 1 *Bland* 57, 85 ; *Williamson v. Wilson*, *Id.* 418, 434 ; *Bank v. Dugan*, 2 *Bland* 254. In this case, there was no opposition to the application that the petitioner be made a co-complainant, and the original complainants make no objection to the granting of the present motion. The application will be granted, but on terms that the petitioner indemnify the original complainants against all future costs of the suit.

 THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

v.

WILLIAM GODDARD and others.

1. A sheriff's sale made by virtue of process issuing out of this court, may be set aside on petition, and without bill, even after the sale has been carried into effect by the delivery of a deed.

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2. A person whose property has been sold at judicial sale, to his injury, may always, if he applies promptly, and is without fault, have the sale set aside upon showing that he was prevented from attending the sale by fraud, mistake or accident.

3. A sale made in violation of a promise to adjourn to a future day will be set aside.

On application to set aside a sheriff's sale, heard on petition, answer and depositions.

Mr. William P. Miller, for petitioners.

Mr. Richard W. Parker, for complainants.

THE VICE-CHANCELLOR.

This is an application to set aside a sale of mortgaged premises made by virtue of process issued out of this court. The complainants were the purchasers, and have received a deed for the lands. The parties claiming to be aggrieved apply for relief by petition. This mode of procedure is challenged by the complainants, who say that after a sale, made in execution of the process of this court, has been carried into effect by the execution of a deed, the power of the court is exhausted, and the transaction so completely ended that it cannot be successfully impugned except by an original suit, regularly brought in the ordinary way. This objection cannot prevail. It was very fully considered by Chancellor Williamson in *Campbell v. Gardner*, 3 Stock. 423, and held to be untenable; and since then the practice sanctioned by that adjudication has been so frequently approved by all of his successors that it must now be considered to be firmly established.

The petitioners claim relief on the ground that they were prevented from attending the sale, and also from taking such other steps as were necessary for the protection of their interests, by the promise of the complainants that the sale should not be made on the day on which it was made, but should be adjourned to a future day. There can be no doubt that a person whose property has been sold at judicial sale, to his injury, may always, if

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he applies promptly, and is without fault, have the sale set aside upon showing that he was prevented from attending the sale by fraud, mistake or accident. This rule is so familiar that it need not be vouched for by the citation of authorities. Chancellor Williamson, in the case just cited, held that the party aggrieved in such case, in order to entitle himself to relief, need not show that he had been misled by a person connected with the sale, but if it appeared that he had been misadvised by a stranger, to whom he had applied for information, sufficient ground might exist for invalidating the sale.

The facts upon which this application rests are undisputed. The sale was made August 31st, 1880. Some days prior to that date, the solicitor of the complainants promised the solicitor who was then acting for the petitioners, that the sale should be adjourned from August 31st to September 7th, 1880, and, immediately after making this promise, he directed one of his clerks, in the presence of the solicitor of the petitioners, to see that the sale was adjourned. The arrangement made by the solicitors provided for further adjournments, conditional on the payment of certain sums of money, but the promise to adjourn from August 31st to September 7th was unconditional—that was to be made in any event. The petitioners were at once informed that the sale would be adjourned, and neither they nor their solicitor attended at the place of sale on the 31st of August. The person directed to attend to the adjournment of the sale did not have it adjourned; so far as appears, he did not speak to the sheriff on the subject. The solicitor of the complainants did not attend the sale, nor was he at his office on the day of the sale. An agent of the complainants, who has charge of their real estate in this state, called at the office of their solicitor on the day of the sale, and shortly before it took place, and being there informed that no arrangement for a further adjournment had been made, he proceeded to the place of sale and directed the sheriff to sell. A sale was made, and this agent bid off the property for the complainants at a sum representing less than one-half of its value. The deed made to the complainants bears date on the day of sale, and it appears that the complainants took posses-

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of a part of the property on the same day, and have since received its rents.

In view of these facts, it is obvious the court cannot allow sale to stand. It was made in violation of a promise which petitioners had a right to believe would be kept. Their conduct shows that they did believe it would be kept. It may be its violation was accidental, but the violation is none the less harmful on that account, and its force, as a ground for equitable relief, is not at all weakened by that fact. Stated briefly, the complainants occupy this position: they have acquired title to the petitioners' property at a sale made under the authority of this court, by a breach of faith, and now seek to keep it, with the sanction of this court. That cannot be done. But the complainants deny that they were bound to keep faith with the petitioners, because they say the promise of their adjournment was obtained by fraud. It may be that a person who induces a promise to adjourn a sale by intentional falsehood or fraud, will not be entitled to ask relief in equity against a sale made in violation of such promise. But no such fraud is proved in this case. Shortly before the promise to adjourn was made, one of the petitioners applied to the person under whose direction the sale was made, at the complainants' office in New York, for an adjournment, and was there told that unless \$300 was paid the sale would take place on the day for which it was then intended. The petitioner at once said he could not pay that sum; he was asked how much he could pay, and he replied that he had \$100 with him, and could probably raise \$50 more. At that point in the conversation, the petitioner says, he was directed to make his application to the solicitor. He says he did so soon as he could find the solicitor at his office, and was told by him that he would enter into no arrangement respecting an adjournment until he had first communicated with his clients. The petitioner then directed his solicitor to negotiate an adjournment. The petitioner admits that he did not tell the complainant's solicitor that he had been told, at the complainants' office in New York, when he first applied there, that unless \$300 was paid the sale must proceed. His failure to do so is the fraud

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which the complainants say justified them in breaking their promise. This omission does not, in my judgment, furnish the slightest evidence of fraud. It is not pretended that the petitioner was expressly directed by the complainants to carry any information to their solicitor, or that he was directed to say to him that an adjournment should only be granted on certain terms. He was simply directed to apply to him for an adjournment. But even if he had been expressly directed to inform the solicitor that an adjournment should only be granted in case a condition was complied with, I think he was absolved from all duty to act as the medium of communication, if it be true, as he says it is—and his statement on this point is uncontradicted—that when he told the solicitor he had been directed by the complainants to apply to him for an adjournment, the solicitor at once said that he would enter into no arrangement with him until he had first communicated with his clients. The petitioner was justified in understanding, from this remark, that no communication he made would be credited as true until it was first verified by the complainants. Silence under such circumstances was not fraud. If the solicitor did as he said he would, it must be assumed that he had full information as to the terms on which his clients were willing to grant an adjournment, before he promised that the sale should be adjourned. In my opinion the evidence does not raise the least suspicion of fraud.

The sale must be set aside, with costs.

THE MECHANICS NATIONAL BANK AT NEWARK

v.

THE H. C. BURNET MANUFACTURING COMPANY and WILLIAM S. SQUIER.

1. Objections which relate to the regularity of a judgment at law, or to the validity of the instrument upon which it is founded, are not relievable in equity.

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2. The remedy for grievances of this character is either by application to the court in which the judgment is entered, or by writ of error.

3. A judgment at law can only be impeached in a court of equity for fraud in its concoction, or upon a purely equitable defence, or upon the ground that a good defence at law has been lost by fraud, ignorance or accident.

4. Fraud perpetrated by means of a judgment is entitled to no more immunity than a fraud perpetrated by any other means.

5. If a judgment, founded upon a just debt, is entered not for the purpose of securing or collecting the debt, but for the purpose of being used as a cover, to protect the defendant's property from his other creditors, the court will denounce it as a fraud and set it aside, as it would any other fraudulent contrivance.

On final hearing on bill, answers and proofs taken before vice-chancellor.

Mr. Albert P. Condit, for complainants.

Mr. John Lilly, for defendant Squier.

Mr. John Whitehead, for corporate defendants.

THE VICE-CHANCELLOR.

The complainants are judgment creditors of the H. C. Burnet Manufacturing Company. Their judgment was recovered in the supreme court of this state, October 19th, 1878. The defendant, William S. Squier, was also a judgment creditor of this corporation. He had six judgments. They were entered in the first district court of the city of Newark, on September 4th, 1878. Executions were immediately issued on them, and a sale made thereunder on the eleventh day of the same month. The sale embraced all the property of the corporate defendants seizable by execution. The judgment debtors were, at the time of the sale, engaged in the manufacture and sale of inks, mucilage and sealing wax, and though their property consisted of a large number of different articles, some manufactured, some in course of manufacture and some in a raw state, some packed in boxes and some unpacked, it was all sold in one bulk. The

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defendant Squier purchased the whole. The complainants seek to have this sale set aside and to hold Mr. Squier responsible for the value of the goods, on the ground that he obtained his judgments and afterwards used them, not for the purpose of collecting or securing his debt, but to place the property of his debtors where it could not be reached by legal process, and thus enable them to defraud their creditors. If the case made by the bill is established by the proofs, there can be no doubt that the complainants are entitled to relief.

The defendants, however, deny that the complainants are entitled to the character they assume. They say they are not judgment creditors. They urge two objections against the validity of the complainants' judgment. First, they say the court in which they recovered their judgment never acquired jurisdiction of the person of the corporate defendants, the summons in the action having been served on a person not authorized to receive service for the corporation; and second, they aver that the debt on which the judgment is founded was not the debt of the corporate defendants, but of one of their officers. These objections, I am of opinion, cannot be considered here. The court which pronounced the judgment in question was entirely competent to hear them, and to give adequate relief, if it found that the defendants were entitled to it.

Courts of equity sometimes give relief against judgments at law, but only where it is shown that the defendant was ignorant of the facts on which his defence rests until after the time for making defence at law had passed; or that he was prevented from making defence by the artifice or fraud of his adversary, or by accident unmixed with negligence or fraud on his part, or that his defence is a matter of pure equity cognizance. But in cases where the grievance he attempts to urge is one that the court which pronounced the judgment is competent to hear and decide, and he has either urged it there unsuccessfully, or has negligently omitted to do so, this court can give no relief. *Reeves v. Cooper*, 1 Beas. 223; *Vaughn v. Johnson*, 1 Stock. 173; *Holmes v. Steele*, 1 Stew. Eq. 173. The precise question mooted in

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This case was decided in *Stratton v. Allen*, 1 C. E. Gr. 229. Chancellor Green there said :

“Objections which relate to the regularity of a judgment, or to the validity of the instrument upon which it is founded, constitute no ground for the interference of this court. If the instrument upon which a judgment is entered was without consideration, or invalid, or if the judgment itself is unauthorized, or illegal, the remedy for the party aggrieved would be by application to the court in which the judgment is entered, or by writ of error. They are questions exclusively for the cognizance of those courts. It seems to be conclusively settled that a judgment can only be impeached in a court of equity for fraud in its concoction.”

This court is not at liberty, therefore, to entertain the objections interposed by the defendants.

There seems to be no proof in this case which will justify the conclusion that the judgments of the defendant Squier were not founded upon a just debt. But this does not preclude an inquiry whether they were not obtained and used for a fraudulent purpose. A judgment may be founded upon an honest debt, and yet it may be obtained under such circumstances and used for such purposes as to make it a fraud. If it is recovered not for the purpose of securing the debt, but solely to be used as a fraudulent cover to protect the defendant's property from his other creditors, it is a fraud, and the courts may deal with it as they would with any other fraudulent contrivance. Fraud perpetrated by means of a judgment is no more entitled to immunity than a fraud perpetrated by means of a deed or mortgage. *Jones v. Naughtright*, 2 Stock. 298. That the forms of law have been pursued is no protection in a court of equity, if the result aimed at and reached is fraud. *Metropolitan Bank v. Durant*, 9 C. E. Gr. 35 ; S. C., on appeal, 9 C. E. Gr. 556.

If a judgment creditor uses his judgment for a fraudulent purpose, as against subsequent judgment creditors, he will be postponed until after they are paid. As for example, if, after levy, he allows the property to remain in the possession and under the control of his debtor for such length of time and under such circumstances, as to justify the conclusion that his object in obtaining it was not to secure or collect his debt, but to protect

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his debtor in the enjoyment of his property and to prevent his other creditors from seizing it for the satisfaction of their debts, his judgment and levy will be declared void as to subsequent judgment creditors. *Casher v. Peterson*, 1 South. 317; *Williamson v. Johnson*, 7 Hal. 86; *Caldwell v. Fifield*, 4 Zab. 150. Fraud destroys whatever it taints, whether it be perpetrated through the machinery of the law or by other means.

The important question then is, Did the defendant Squier obtain his judgments for the purpose of perpetrating a fraud, or has he made a fraudulent use of them? They were obtained under very extraordinary circumstances. He is a dealer in chemicals, and furnished the corporate defendants with all the material they required in their business. At the time he sued, the corporation had but a single officer, at least so Mr. Squier believed. He says the secretary was the only officer he knew or recognized, and he exercised absolute control over all the affairs of the corporation. He and the secretary were on exceedingly intimate and friendly terms; he had been permitted for some time to store his chemicals on the premises of the defendants, and for more than a month prior to the time when he sued, he had been furnished a room in the factory of the defendants, by the secretary, where he received his mail and attended to his correspondence. His six suits were brought on the 29th of August, 1878. He heard of the complainants' claim about this time, but he says he never thought the corporation owed them anything. When he sued, his whole claim amounted to \$1,163.15. Of this amount he says \$242.17 was borrowed money, and advanced in three loans: \$25 August 17th; \$50 August 24th, and \$167.71 on August 27th. He says he paid in addition, on August 24th, in the purchase of a judgment against the corporation, the sum of \$146.95. He made the purchase at the request of the secretary, and took an assignment of the judgment. He admits he believed the corporation was solvent when he sued. The judgment purchased seems to have been the only one which, up to that time, had been recovered against the corporation, and, so far as the evidence shows, no creditor had previously sued them. He and the corporation, prior to this time, had been in the habit of issuing notes for the

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accommodation of each other. Before bringing his suits he made effort either to collect his debt or to have it secured, though the corporation undoubtedly, with very little effort, could have had the sum necessary to pay it, and had property amply sufficient to secure it. He says he asked, on August 28th, for the return of the \$167.71, loaned August 27th; payment was made, but he does not pretend that his demand was repulsed so severely, so that his indignation was aroused, or that any disclosure was made which excited his fears. In his narrative of what preceded the suits, nothing can be found which justifies his conduct, or discloses the slightest reason or motive for his suits. In view of the facts, as he states them himself, it is impossible to get the conviction that his suits were not the result of a scheme, concocted by him and the secretary, to attain some object which he now desires to conceal.

The events occurring at the sale, as well as those which immediately preceded and succeeded it, show, I think, with even greater clearness, the real purpose of the parties. Mr. Squier, after he obtained his judgments, he told the secretary he was going to sell if he was not paid. The secretary was not disturbed by this announcement, at least he did nothing and said nothing to prevent the threat from being carried into execution. A short time before the sale, it is proved that the secretary hid a bundle of papers, which he said were the advertisements put up by the constable, and that they had not been up many minutes before they were taken down. No attempt has been made to prove where the notices of this sale were set up, or to show that they remained up for a longer time than that mentioned by the secretary. On the day before the sale and on the day of the sale, the secretary made an inventory of all the tangible property of the corporation. Why he did so does not appear. It was not exhibited at the sale. The defendant says he never saw it. The hands employed in the factory were kept at work till midday on the day of sale, when they were sent away by order of the secretary, and given leave to use the balance of the day as a holiday. They were not discharged, nor informed of the sale, nor does it appear that the slightest intimation was given

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to them that it was at all uncertain whether they would be required to resume work in the morning. It does not appear that any of them were at the sale, and there is nothing to show that they knew a sale was to be made. The secretary sent a messenger for a person that Mr. Squier had requested to attend the sale, but who had not appeared when the constable was ready to proceed.

As already stated, the property was sold as an entirety. The constable thinks he sold it in three lots, but the bidding at the sale, as given by Mr. Squier, shows conclusively that he is mistaken. Who gave direction as to how the property should be sold, neither Mr. Squier nor the constable can tell. Mr. Squier is sure he did not, while the constable says that he publicly asked for direction, and received it, but cannot tell from whom it came. Immediately after the sale, Mr. Squier took possession of the property and also of the factory, though he had acquired no right to the term of the corporation in the factory. He says he told the secretary that he should continue the business, and desired him to remain in charge. The secretary at once consented to do so. Though Mr. Squier positively affirms that he had no understanding or arrangement with the secretary before the sale, yet I think it is impossible for any one to listen to his story describing what transpired between them after the sale, without seeing, almost as clearly as though no effort to conceal anything had been made, that both fully understood that the business was to be continued, and that the secretary was to remain in charge. Mr. Squier admits that he expected the workmen to return the next morning and resume work. Business was resumed the next morning in the name of the corporation, and was continued in its name until this suit was brought. The name of the corporation was used with the consent of its secretary, in order, as it is said, that Mr. Squier might have the benefit of it as a trade mark. The goods sold were shipped in the name of the corporation, with the words "From W. S. Squier" written across the shipping receipt, and charged upon the books of the corporation. The accounts so charged were afterwards assigned by the corporation, acting by its secretary, to Mr. Squier. In one

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stance it is proved that an account so charged was collected by draft on the debtor, drawn by the corporation, the secretary, of course, acting for the corporation. A short time after the sale, debts due to the corporation, amounting to about \$1900, were signed by the corporation to Mr. Squier, upon which, he says, he advanced to its secretary, at various times, about \$1500. He says he has collected on the accounts so assigned, about \$650, and that the officers and agents of the corporation have collected and appropriated the balance.

These facts, in my judgment, speak for themselves. They require no comment. They demonstrate, beyond doubt, the true character of this transaction. They permit but one deduction, and that is, that the judgments and sale were an entirely friendly proceeding, contrived and arranged by Mr. Squier and the secretary of the corporation, for the purpose of effecting an ostensible change in the ownership of the property of the corporation, with intent to defeat the enforcement of the complainant's claim. The assignment to Mr. Squier of the debts due to the corporation, is, I think, tainted with the same illegality. It was the natural sequence of what preceded it, and is manifestly infected with the same evil purpose.

A decree will be advised setting aside the sale and assignment, and requiring the defendant Squier to account for and pay whatever he may have received under either. The complainants are, of course, entitled to costs.

Haydock v. Haydock.

THE EXECUTORS OF EDEN HAYDOCK, deceased,

v.

ELIZA P. HAYDOCK.

1. The question whether an act is the product of undue influence or not, must always be largely controlled by the state of health and condition of mind of the person alleged to have been unduly influenced.

2. Whatever destroys free agency, and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity or any other species of mental or physical coercion.

3. Undue influence is not measured by degree or extent, but by its effect; if it is sufficient to destroy free agency, it is undue, even if it is slight.

On final hearing, on bill, answer and proofs taken before the vice-chancellor.

Mr. Garret Berry and Mr. J. Henry Stone, for complainants.

Mr. Benjamin A. Vail and Mr. James R. English, for defendant.

THE VICE-CHANCELLOR.

The object of this suit is to set aside two gifts made by a husband to a wife shortly before his death. The grounds alleged are want of capacity and undue influence.

Eden Haydock died April 29th, 1879. He left a widow, the defendant in this suit, and an only child, a daughter by a former wife. By his will, which was executed March 23d, 1871, he gave his widow \$1,000, payable immediately after his death, and an annuity of \$600 during her widowhood, payable in semi-annual installments, the first payment to be made at the expiration of a year from his death. The balance of his estate is given to his daughter. His estate, exclusive of the gifts, amounts to a trifle less than \$16,300. The gifts represent a value of \$9,000. They were made at different

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tes, the first, February 24th, 1879, and embraced nine shares of the capital stock of the United New Jersey Railroad and Canal Company, and seven bonds of the city of Rahway, having a face value of \$7,000; and the second was made March 10th, 1879, and consisted of a promissory note for \$5,000. Regular transfers were made, and the gifts completed by formal delivery.

The evidence respecting the state of the donor's mind when the gifts were made is very conflicting. That on the part of the complainants shows a case of utter imbecility, a mind so thoroughly decayed as to be unable to comprehend the simplest matters—and this is shown to have been its condition for some months antecedent to the time when the gifts were made; whilst the evidence for the defendant shows a mind somewhat enfeebled by the decay incident to old age, which, to some extent, had lost its original power and grasp, and in which memory was quite defective, but yet possessing sufficient vigor to understand, in a reasonable manner, the ordinary affairs of life, and to deal with them rationally. The facts and circumstances adduced by the parties in support of their opposing theories are, in my judgment, so nearly equal in force and weight, that, did the decision of the case depend solely upon the solution of the question of capacity, a problem of almost insoluble difficulty would be presented. But I think the rights in dispute may be safely and properly determined without a struggle with the difficulty just mentioned. The case hinges, I think, upon the solution of another question; one which I regard as comparatively free from difficulty.

The question to which I refer is, were these gifts procured by the exercise of undue influence? The determination of this question must always be largely controlled by the state of health and condition of mind of the person alleged to have been unduly and unfairly influenced. A mind naturally weak, or which has become impaired by age, disease or grief, is much more subject to any sort of control than one naturally strong and unimpaired.

It is always, therefore, a matter of the first importance to the tribunal charged with the duty of deciding this question, to know fully the situation and surroundings, and the exact condition of

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mind and state of physical health of the person alleged to have been imposed upon.

No definition of what the law denominates undue influence can be given which will furnish a safe and reliable test for every case. Each case must be decided on its own special facts. All that can be said, in the way of formulating a general rule on this subject, is, that whatever destroys free agency, and constrains the person whose act is brought in judgment, to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity or any other species of mental or physical coercion. The extent or degree of the influence is quite immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor. *Turner v. Cheesman*, 2 McCart. 243, 265; *Executors of Moore v. Blauvelt*, 2 McCart. 367; *Lynch v. Clements*, 9 C. E. Gr. 431.

Cases of this class generally cast upon the tribunal charged with the duty of deciding them responsibilities of the weightiest character. It is the duty of the courts to inflexibly maintain the right of the citizen to exercise full and complete dominion over his property, in making such disposition of it as to him may seem proper, but they are under a duty, equally solemn and imperative, not to allow him in his old age, after his strength and vigor have departed, and he has fallen into decrepitude and weakness, to be despoiled of his property by any sort of coercion or trick. It is their duty to uphold the rights of the strong, but it is also their duty to protect the weak.

At the time the gifts were made, Mr. Haydock was upwards of seventy-five years of age; his wife was about fifty-five. For two or three months preceding the gifts, Mr. Haydock had been confined to the house by sickness; he was so feeble, physically, as to require assistance in dressing and undressing; he saw few persons besides the members of his household and his physician. From the 15th of January, 1879, up to the time of his death, he

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was almost constantly in charge of his wife and her brother, George Bayright. Prior to the date just mentioned, George Bayright and his wife had kept house at Asbury Park, but at that date they closed their house, and Mrs. Bayright went to Brooklyn, and Mr. Bayright went to Rahway, where Mr. Haydock resided, and took up his residence with him, where he remained, except for short intervals, until Mr. Haydock died. Mr. Haydock and his daughter had no intercourse after the fall of 1878. On November 30th, 1878, his daughter procured a commission of lunacy to be issued against him. Before it issued, the proofs show that Mrs. Haydock had consulted counsel as to what steps would be necessary for her to take to have a guardian appointed for Mr. Haydock, and in the conference stated that she thought he required a guardian. The commission sued out by the daughter was executed December 24th, 1878, and resulted in a finding that Mr. Haydock was then of sound mind. The evidence leaves no ground for doubt that Mr. Haydock had sufficient mind at this time to understand the nature of this proceeding. Its institution deeply wounded him. He thought it degraded him, and that it was prompted solely by mercenary motives. He did not appear before the commissioners; the condition of his health rendered it imprudent, if not dangerous, for him to do so, but he was represented by his wife and also by counsel. No evidence has been offered tending to show that he prepared the defence made to the lunacy proceedings, nor that he gave any direction or instruction concerning it. The finding of the jury gave him great satisfaction. When he first heard of it he expressed his satisfaction by exclaiming "Richard is himself again!" Even prior to this proceeding, there can be no doubt that his wife possessed a strong influence over him. There are many phases of his conduct which show that he stood in dread of her. On one or two occasions it is proved that he said, after having done something which displayed great infirmity of memory, as an offer to pay a debt a second time, "Don't tell Eliza." The attempt of the daughter to have him placed under the control of a guardian, and the defence made in his behalf by his wife, naturally had the effect of weakening the influence of the

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daughter and increasing that of the wife. The wife admits that her influence over him was all-powerful. While under cross-examination she was asked if she had not proposed to her husband to make over his property to her, to which she replied she had not, but added, "I suppose if I had asked him to do so, he would have done it." If she is not mistaken in her estimate of her power, it would seem that he must have been a very plastic instrument in her hands, and that she could mould his will into any form dictated by either her interest or her fancy.

His mind at this time was in a state of decay ; senile dementia had undoubtedly commenced. He was very forgetful ; he did not comprehend either readily or clearly ; his perceptions were blunted ; all his intellectual faculties were dull and stupid. Those who had known him longest, and were best able to contrast the present condition of his mind with its state when in its original vigor, almost with one accord looked upon him as an intellectual wreck. There is evidence in the case, coming from sources entitled to great respect and confidence, which, without anything to countervail it, would be abundantly sufficient to support a finding that at the time the gifts were made, Mr. Haydock did not possess testamentary capacity, even according to the low standard fixed by the adjudications of this state. But there is countervailing evidence, and I am not persuaded that the court ought to declare the gifts void solely on the ground of want of capacity. It is certain, however, that Mr. Haydock was in a condition of extreme dependence. He was weak in body and feeble in mind ; he could do little for himself ; he was compelled to look to others for almost everything that could make life either desirable or endurable. He was in a position where he would be likely to be easily controlled and to yield to light influences, especially if exerted by a person in whom he had confidence, or upon whom he was dependent.

This brings us to the main question : Were these gifts the product of undue influence ? The defendant says they were purely voluntary, and that she did not even know of her husband's intention to make them until he was ready to execute it. They were the subject of conversation between them, though,

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According to the testimony of the defendant's brother George, they had been fully determined upon nearly a month before the first was made, and the securities which were to be the subject of them had been separated by Mr. Haydock from his other securities and their value computed. Considering the intimate and confidential relations of the parties, their constant association, and the strong inducement the husband was under to make known to his wife any generous purpose he may have entertained towards her, the reticence attributed to him strikes my mind as not only unnatural and improbable, but as a circumstance justifying the most painful suspicions. What reason is it possible to assign for this extraordinary silence? Whether the gifts were dictated by love for the wife, or by hatred for the daughter, or were the product of mingled love and resentment, the feeling was one that men do not usually conceal without a motive. It can hardly be believed that a man in his situation would have attempted to perpetrate a surprise. Childish minds are usually frank and open; they attempt no concealments and keep no secrets. If the generous purpose ascribed to Mr. Haydock had originated with him, I am unable to believe that it would have been possible for him, in his weak and dependent state, to have withheld all knowledge of it from his wife until he was ready to execute it, and the fact that she solemnly declares that he did, introduces a circumstance in support of her claim so unnatural and improbable as to shock credulity and to cast deep distrust upon her whole case.

The defendant's brother George would not say that he never heard the defendant ask or importune her husband to make over his property to her. All he can be induced to say on this point is that he may have heard her ask him to do so, but if he did he does not recollect it. This style of testifying has very much the appearance of an attempt to suppress the truth. There are witnesses whose moral sense seems to be much less outraged by a suppression of the truth than by a downright denial of it. They seem to think the shock to conscience will be much less violent if they merely pretend to forget, than it would be if they ventured upon a bold, blunt denial. In this case, the trans-

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action inquired about had only recently occurred, if it ever occurred at all, and it was of a character likely to fasten itself firmly upon his memory that he could not forget it. It was a thing which, if he heard, he could not forget, and if he did hear it, he would be able to say, positively, that it never occurred in his presence. Under some circumstances, feigned forgetfulness of a fact may be very satisfactory proof of its existence.

A female servant who lived in the family of Mr. Haydock from September, 1878, up to the middle of February, 1879, swears that Mrs. Haydock talked to her husband almost every day about his money affairs; that Mr. Haydock said very little; in the language of the witness, she could hardly get a word out of him, and that his disinclination to talk about his business made her very angry. She also says that Mrs. Haydock had papers which she wanted Mr. Haydock to sign, and that she heard Mrs. Haydock say more than once, when she was angry, that she would not stay with him. This witness seemed to me to be entirely trustworthy. There was nothing in her deportment nor in her story which created the slightest doubt of the substantial truth of her testimony. She was free from all interest or bias, and had no motive to misrepresent or withhold the truth. Another female servant, who lived in the family for some weeks after the one whose testimony has just been referred to left, testifies to acts and expressions by Mrs. Haydock constituting coercion of the most offensive sort. If her testimony is true, Mr. Haydock was almost constantly, during the time she was in his family, importuned to sign papers and make over his property, by methods which, in his situation, amounted to absolute torture. But there are portions of her story which, I am satisfied, are inventions. She is also self-contradicted. Standing alone, her testimony would be entitled to no consideration whatever, but viewed, as it must be, in connection with the other evidence in the case, I do not think it can be discarded as without truth or force.

The conclusion I have reached, after listening to the witnesses, and attentively observing their manner while testifying, and after giving their evidence the most patient and careful consid-

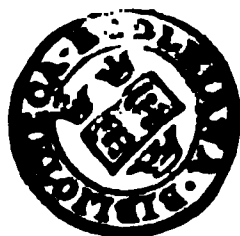
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ation, is, that the gifts in question were procured by the exercise of undue influence. I have not adverted to all the evidence which has led me to this conclusion. Usually, in cases of this kind, there are many little things, which, in the abstract, are mere trifles, so small as to be difficult to describe as separate matters, but which, when combined, and considered in the concrete, exercise a very potent influence upon the judgment. There are any such trifles in this case.

Besides, the transactions brought under review belong to a class which it is the habit of courts of equity to examine with watchful jealousy. A wife may make a valid gift to her husband, but such gifts are not favored in equity, and, if challenged, a court of equity will examine them with an anxious watchfulness and caution and a dread of undue influence, and never sanction them unless they appear to be the free act of the wife.

Story's Eq. Jur. § 1396.

The reason is obvious. The husband is master; the wife occupies a position of dependence, and in many cases his superior position enables him to control her will by his wish. The parties are had exchanged their original positions. The wife, in consequence of her husband's weakness, had taken his place, and he had sunk into hers. For this reason, I think, the court is bound, in determining the validity of the gifts in question, to apply the salutary principle just stated, and, unless convinced that they are the free, voluntary, and well-understood acts of the donor's mind, must set them aside. I am not so convinced, and shall, consequently, advise a decree for complainants. The complainants are entitled to costs.



Blakeley v. Blakeley.

JANE BLAKELEY

v.

SIDNEY BLAKELEY et al.

1. When no fraud is alleged, and where incapacity is the ground on which a deed is sought to be set aside, the test is, had the grantor sufficient mind to comprehend, in a reasonable manner, the nature and effect of what he was doing?

2. A suitor who seeks to set aside a deed on the ground of incapacity, must do something more than show insanity; he must show that the transaction he seeks to invalidate was affected by the grantor's derangement.

3. A deed made by a person of non-sane mind, before unsoundness is established by inquisition, is not void, but merely voidable, and may be confirmed in lucid intervals so as to be unimpeachable.

On final hearing on bill, answer, and proofs taken before a master.

Mr. John A. Miller, for complainant.

Mr. Wm. B. Guild, jun., for defendants.

THE VICE-CHANCELLOR.

The complainant seeks to set aside a deed made by her mother to one of the defendants, on the ground that her mother,

NOTE.—A deed or contract made during insanity may be ratified by the grantor, if his sanity be subsequently restored (*Breckinridge v. Ormsby*, 1 J. J. Marsh. 236; *Allen v. Berryhill*, 27 Iowa 534; *Carrier v. Sears*, 4 Allen 336; *Bassett v. Brown*, 105 Mass. 551; *Taylor v. Patrick*, 1 Bibb 168; *Walters v. Barral*, 2 Bush 598); including an invalid marriage (*Cole v. Cole*, 5 Sneed 57; *Crump v. Morgan*, 3 Ired. Eq. 91. See *Johnson v. Johnson*, 45 Mo. 595; *Jones v. Jones*, 36 Md. 447; *Andrews v. Page*, 3 Heisk. 654); or waiving a right of dower (*Brown v. Hodgdon*, 31 Me. 65; but see *Pinkerton v. Sargent*, 102 Mass. 568); or a contract made during intoxication (*Eaton v. Perry*, 29 Mo. 96; *Blagg v. Hunter*, 15 Ark. 246; *Barrett v. Buxton*, 2 Aik. 167; *Arnold v. Hickman*, 6 Munf. 15; *Matthews v. Baxter*, L. R. (8 Exch.) 132); or one obtained by fraud (*Moxon v. Payne*, L. R. (7 Ch.) 442; *Montgomery v. Pickering*, 116 Mass. 227; *Bradley v. Chase*, 22 Me. 511; *Pearsoll v. Chapin*, 44 Pa. St. 9;

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When she executed the deed, was insane. The deed was made by a mother to a daughter, both of whom bore the masculine name of Sidney.

The mother's mental condition is thus described in the bill: Her mind was so unsound and deranged that it was impossible for her to understand the purport and effect of a deed, and she was incapable of receiving an intelligent impression. If this is a correct description of the mother's mind when she executed the deed, there can be no doubt that it must be adjudged voidable, for the test in this class of cases, when no fraud is alleged, is, had the grantor the ability to comprehend, in a reasonable manner, the nature and effect of the act he was doing? If he had, the deed is valid; if he had not, it is voidable. It is not indispensable, in order to validate his act, that he should be entirely free from delusion or mania; he may be irrational on some subjects and yet his deed be valid. A suitor seeking to set aside a deed on the ground of insanity in the grantor, must do something more than show the mere fact of insanity; he must, in addition, show that the transaction which he challenges was affected by the grantor's derangement. Chief Justice Beasley, speaking for the court of errors and appeals, in *Lozear v. Shields*, 8 C. E. Gr. 510, said it was a mistake to suppose that if any phase of insanity was shown, the transaction brought in question must necessarily be held invalid. Mania does not, *per se*, vitiate a transaction, for the question in such cases is, has the transaction called in question been affected by it? Proof of a morbid turn of mind, on a subject entirely disconnected from the transaction

Hanson v. Field, 41 Miss. 712; *First Nat. Bank v. Gay*, 63 Mo. 33; or, by forgery (*Brook v. Hook*, L. R. (6 Exch.) 89; *Wilkinson v. Stoney*, 1 Jebb & S. 509; *Ashpitel v. Bryan*, 2 B. & S. 492; *Union Bank v. Middlebrook*, 33 Conn. 95; *Howard v. Duncan*, 3 Lans. 174; *Thorn v. Bell*, Hill & Den. 430; *Greenfield Bank v. Crafts*, 4 Allen 447; *Dow v. Spenny*, 29 Mo. 386; see *Bell ads. Shields*, 4 Harr. 93; *Forsyth v. Day*, 46 Me. 176; *Terry v. Bissell*, 26 Conn. 23; *Walker v. St. Louis Bank*, 5 Mo. App. 214).

While there may be a ratification of a tort (*Cooley on Torts* 127; *Broom's Max.* *679; see *Stickney v. Munroe*, 44 Me. 195; *Perrin v. Claflin*, 11 Mo. 13; *Moore v. Rogers*, 6 Jones 297), *semble*, there can be none of a crime (*Morse v. State*, 6 Conn. 9).

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brought in judgment, is absolutely irrelevant. Substantia- the same views were expressed by the supreme court in *Eaton* v. *Eaton*, 8 Vr. 113.

If the proofs on the part of the complainant are believed, it is fully proved that the mother was under the influence of insane delusions, of a very marked and decided character, about the time she executed the deed in question. She believed she was in danger of being murdered by a number of different persons, among whom were her daughter Sidney and a prominent clergyman of the Roman Catholic church. So strong was this delusion with respect to her daughter, that there were times when she would not take food prepared by her, declaring she believed it was poisoned. She also accused her, unjustly, of striking her with an iron bar, and of driving her from her own house. It is also proved that shortly before the deed was made, she approached one of her grandchildren, with a knife in her hand, declaring that she meant to kill her; that while under the influence of a mad freak, she cut a night-dress, belonging to this grandchild, into strips; it is also proved that she attempted to commit suicide, by cutting her throat with a pair of scissors, and twice reported, to one or more of her relatives, that the daughter to whom she made the deed in question had been dead for some time. She seems, also, to have believed that those to whom she entrusted the care of her money were endeavoring to defraud her. If this evidence stood alone, I think it would be very difficult to resist the conviction that the grantor's mind was so thoroughly wrecked, and her reason so completely dethroned, when she made the deed

There must be an affirmance or disaffirmance of the entire contract (*McGuire* v. *Callahan*, 19 Ind. 128; *Arnold* v. *Richmond Iron Works*, 1 Gray 437; *Hunter* v. *Steinbridge*, 17 Ga. 243).

What acts amount to a ratification (*Grant* v. *Thompson*, 4 Conn. 203; *Bassett* v. *Brown*, 105 Mass. 551; *Van Deusen* v. *Sweet*, 51 N. Y. 378; *Williams* v. *Inabert*, 1 Bailey 343; *Bond* v. *Bond*, 7 Allen 1; *Fitzpatrick* v. *Combs*, 7 Humph. 224; *Ladd* v. *Hildebrandt*, 27 Wis. 135; *Thacher* v. *Pray*, 113 Mass. 291; *Gore* v. *Gibson*, 13 M. & W. 626, *Pollock*, C. B.; *Humphreys* v. *Guillon*, 15 N. H. 385; *Reinskopf* v. *Rogge*, 37 Ind. 207; *Leslie* v. *Wiley*, 47 N. Y. 648; *Kirk* v. *Glover*, 5 Stew. & Port. 340; *Dean* v. *Yates*, 22 Ohio St. 388). See, further, *Scanlan* v. *Cobb*, 26 Am. Law Reg. 312, note.—REP.

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In question, that it was impossible for her to have had anything like a reasonable understanding or clear apprehension of the act she was engaged in, when she executed it.

But almost every witness who testifies to acts or expressions tending to show insanity, also says there were times when she was rational. They agree, with almost entire unanimity, that in all her business matters she seemed to be sane. They describe her as economical to meanness; one says of her that she was so stingy as actually to deprive herself of the necessities of life. In all matters of business she seems to have acted with care and caution; and her business transactions, so far as they have been brought to the attention of the court, seem to have been managed with sound judgment and good sense. She obtained title to the property in controversy only a week before she made the deed now sought to be set aside. The deed to her bears date May 19th, 1877, and that to the defendant May 26th, 1877. The complainant does not deny her mother's competency to acquire property; indeed, the evidence shows that she negotiated the purchase with great shrewdness and tact. No change in her mental condition is shown to have taken place between the date of the deed to her and the date of the deed from her. If she was competent to buy, she was competent to convey. Her capacity to acquire is not disputed. The acquisition of this property by the grantor, so short a time before she made the deed in dispute, and the fact that in making the contract of purchase, she acted with shrewdness and sound judgment, are facts possessing almost decisive weight on the question of capacity. Relief should not be given in equity on a case which, in its fundamental facts, is glaringly inconsistent.

But the question of the case is, Did the grantor, when she executed this deed, comprehend, in a reasonable manner, the nature and effect of her act? The act itself, in view of the facts, was neither irrational nor unjust. She paid \$1,650 for the property. She had already given the house where she lived to one of her sons. The grantee of the deed in question was her youngest daughter. She was the only one of her children who had remained with her in her old age. The others had left her, and gone

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out into the world to do for themselves. This one sometimes went to service, but when she did so, she either gave her wages to her mother or expended them in the purchase of necessities or comforts for her. The mother said she was the best child she had. This praise was fully warranted by the daughter's filial conduct. Her love for her mother was very strong. On one occasion, when it was suggested that her mother should be sent to a lunatic asylum, she at once declared that her mother should never be sent there while she could get money enough to keep her out. She may not have been wise in her love, but there can be no doubt about its sincerity. While the other children were laboring to accumulate property for themselves, this daughter was devoting her life to her mother. They were not only willing that she should make this sacrifice for her mother's sake, but they seemed to expect her to do it. It was, therefore, both natural and just that the mother should feel a strong preference for this daughter.

But the most satisfactory evidence in elucidation of the question propounded by the case is, what the mother said in explanation of her purchase, and why she had conveyed the property to the defendant. Sixteen witnesses have repeated remarks made by the mother upon this subject. Three of them testify that the mother said, in March or April, 1877, she was going to buy a property for Sidney. One of the three also says that she said Sidney had worked hard; had been good to her; had waited on her, and taken good care of her. The others testify to declarations, extending from May, 1877, to January, 1878, showing that the mother fully understood that she had purchased a property in East Orange, and had afterwards conveyed it to Sidney. In almost every instance, she gave the reason which induced her to convey the property to her daughter. One of them narrates his conversation with the mother in this fashion, after giving the time as being in October, 1877:

"She asked me if I knew anything about her purchasing a property in East Orange; I said 'Yes, you told me about it before I went away;' she said, 'Why, I do not remember it;' I then put her in mind of what she said in May previous; then she recollected. I then asked her what the property

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was worth, and she told me the sum she bought it for ; I can't remember the amount now. I then asked her whether she was really going to give it to Sidney, and she replied, ' Who has got a better right to it ? ' ”

Taken together, these declarations show, first, that the mother was sensible of her obligations to her daughter ; second, that she intended to reward the daughter for her sacrifices ; third, that she made the purchase for the purpose of giving it to her daughter, and fourth, that the conveyance to the daughter was made to fulfill the object she had in view in making the purchase. It would be difficult, I think, in any case, to furnish more conclusive evidence that a grantor fully understood and appreciated what he was doing, when he made a deed, by proof of his declarations and statements, than is presented by the evidence in this case.

This case differs, in an important particular, from ordinary cases. Ordinarily, where mental incapacity is set up to avoid a deed, the grantor conveys something which he has owned for a considerable period of time. But here, the grantor obtained title to the thing conveyed very shortly before conveying it, and for the purpose of making it over, by way of gift, to her child. And this case is marked by this further peculiarity : those who challenge the capacity of the person whose act they bring in question, do not seek to avoid that part of her act by which she obtained title, but merely that part of her act by which she divested herself of title. So that they place themselves in this incongruous position : she was sane enough to negotiate a purchase, and had sufficient understanding to accept a title, but she was not sane enough to dispose of her property to reward a child who had given her the best years of its life.

Though the deed in question was signed and acknowledged May 26th, 1877, it was not fully executed by delivery until November 12th, 1877. It is not proved that even then there was an actual delivery. The person who had possession of it up to that date says that he gave it then either to the daughter or the mother, but he does not distinctly remember which. But for another piece of evidence, it might be doubted whether the proof of delivery was sufficient to pass title. But it is proved by an insurance agent that on the 14th of November, 1877, the mother

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applied to him for a policy on this property, and that she gave him a description of the house, its location, stated the amount of insurance desired, and instructed him to issue the policy in the name of Sidney Blakeley, jun., as owner. This fact I regard as one of great weight, aside from its importance on the question of delivery. It was not only the act of an apparently sane mind, but of a provident, cautious and thoughtful person.

The evidence, I think, fully demonstrates that the mother, both when she signed and acknowledged the deed in question and when she executed it by delivery, fully and clearly comprehended what she was doing, and, in my judgment, her acts, in those respects, were not only rational, but eminently just.

Another topic should be adverted to. A deed by a person of non-sane mind, made before the fact of insanity is found by inquiry, is not void, but merely voidable. If lucid intervals occur, after the deed is made, and in such intervals the grantor confirms and ratifies the deed, it thereby becomes unimpeachable. *Allis v. Billings*, 6 Met. 415; *Arnold v. Richmond Iron Works*, 1 Gray 434; *Gibson v. Loper*, 6 Gray 279; *Wart v. Maxwell*, 5 Pick. 27. In *Allis v. Billings*, the court say:

“A voidable deed is capable of confirmation, and if a grantor, when insane, makes a deed, and should afterwards, in a lucid interval, well understanding the nature of the instrument, ratify and adopt it as his deed, as by receiving the purchase-money due under it, this would give effect to it, and render it valid in the hands of the grantee.”

As already remarked, nearly all of the witnesses who testify to acts or expressions indicative of insanity, also give evidence showing clearly that Mrs. Blakeley's fits of insanity were but of temporary duration, and were always succeeded by lucid intervals. There is scarcely a witness who has spoken upon the main point in contest, but has given evidence showing more or less clearly that there were times when she was entirely rational. Her conduct and speech remove all doubt upon this point. Her conversations about the time the deed was made; her declarations showing why she intended to buy this property, and her subsequent declarations showing what she had done with it; her fre-

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quent acknowledgment of her obligations to her daughter, and her statement of the considerations which influenced her in making the property over to her daughter, demonstrate not only that her mind was free from mania or delusion at those times, but that she fully understood what she had done, and meant to stand by her act. There is no evidence proving directly that, at the particular time when this deed was executed, she did or said anything indicating that she was not in the full enjoyment of her reason; on the contrary, the evidence shows she was. But if it had been shown that she was actually insane at that time, still, I think, the evidence of ratification, when her mind was lucid and she was free from delusion, is so strong and full that the court would be bound to declare that any infirmity which had existed originally had been removed by confirmation.

One other fact should be noticed. The defendant was one of the persons whom the mother believed had designs upon her life. While this delusion lasted, it is certain, I think, that the mother would bestow nothing upon the daughter that she was at liberty to withhold. No one pretends that the mother ever said, when justifying or explaining her gift, that she made it to appease the imaginary hatred of her daughter, or to purchase immunity from the evil she thought her daughter intended to do to her. The fact that she was at times subject to this delusion respecting her daughter, furnishes very cogent evidence that she was free from its influence at the time this deed was made.

I think the complainant's case fails at all points, and that her bill should be dismissed, with costs.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY,
FEBRUARY TERM, 1881.

THEODORE RUNYON, Esq., ORDINARY.

ELIZA P. WANZER, administratrix,

v.

KATE ELDRIDGE, guardian &c.

Under an order of the orphans court, an administratrix sold lands of her estate to pay debts. The sale was announced as being made free of encumbrances, and the property was struck off at \$2,900, and the sale confirmed by court. Afterward, the purchaser refused to comply with his bid, because of an assessment and two judgments against former owners of the premises liens thereon. The assessment was paid off before, but the judgments remained until after the expiration of the time for completing the sale. The administratrix then obtained an order vacating the confirmation order, re-advertised the property and tried, without success, to sell it again; she also petitioned the court for directions in the premises, but this petition was dismissed.—

That she was not chargeable with the \$2,900.

That her petition for directions was properly dismissed.

Appeal from decree of Middlesex orphans court. On testimony and state of the case.

Wanzer v. Eldridge.

Mr. S. D. Grimstead, for appellant.

Mr. C. T. Cowenhoven, for respondent.

THE ORDINARY.

The orphans court charged the appellant, in her intermediate account of her administration, with the amount of \$2,900 of the purchase-money at which certain real estate of the intestate was sold by her to raise money to pay debts, under an order of the orphans court. The order was made March 16th, 1875. The purchasers were Francis M. Oliver and Jarvis Wanzer, jun. The sale was duly reported to the orphans court, and was confirmed June 1st, 1875. Subsequently, the purchasers having refused to accept the deed and complete their purchase, she applied to the orphans court for an order setting aside the order of confirmation, and for a new order of sale. It appears, by the state of the case, that this application was granted, and she was orally (but no order was entered) directed by the court to proceed to sell the property again, and then report the whole proceedings. She accordingly again advertised the property, and put it up for sale, but has not been able to get any bid for it, and it still remains undisposed of. The intermediate account above mentioned was rendered in pursuance of the requirement of a citation. The administratrix did not charge herself therein with the \$2,900, or any part of it; nor did she ever receive it or any part of it. The respondent excepted to the account because the administratrix had not charged herself with the \$2,900. Before the exception came on for hearing, the administratrix applied by petition, to the orphans court, for direction in the matter of the sale, but the prayer of the petition, after hearing thereon, was denied. It appears that at the sale at which Oliver and Wanzer purchased it was orally stated by the auctioneer, immediately after he read the conditions, which were in writing, that the property was to be sold free of all encumbrance. Oliver swears to the fact distinctly and explicitly. He testifies, further, that the administratrix also told him the same thing. The auctioneer swears that he said in the presence of all, in answer to

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question, that the property was to be sold free of encumbrances, and he adds that he presumes that that statement is in the conditions. It appears, however, that it is not. The administratrix corroborates Oliver. She swears that she told Wanzer positively that if he should buy the property, he should have a title free from all encumbrance—that she would clear it of all encumbrance. She says, also, that she told the auctioneer to sell free from all encumbrances. She also says that she did not then know of the existence of the judgments hereinafter mentioned. There is no room to doubt that the property was sold free of all encumbrance. Oliver placed in the hands of his counsel \$2,200 in cash and his note for \$700, for the purchase-money, to be handed over when the title should be approved by his counsel. The property, at the time of the sale, was subject to a sewer assessment of \$700, and also to the lien of two judgments for about \$4,000, against previous owners. The administratrix, on the 26th of July, 1875, delivered a deed, duly executed, to the purchasers, and required them to complete the purchase. It would seem that the sewer assessments had then been paid by her. They referred her to Orney, who made the tender, to their counsel, who refused to accept the conveyance, on the ground that the property was subject to the lien of the judgments. The administratrix proceeded to obtain a release of the property from that lien, and when, after having succeeded in doing so, she again (but not till after the time fixed in the conditions of sale for the delivery of the deed had passed) tendered the deed to Oliver and his counsel, they refused to accept it, saying that they had made other disposition of the money which Oliver had left in the hands of his counsel, and had given up the idea of taking the property, and had supposed that the administratrix had also abandoned all expectation that they would take it. Upon the foregoing statement of facts, there appears to be no ground for charging the administratrix with the purchase-money. The decree of the orphans court, allowing the exception and surcharging the account, will be reversed, with costs.

The administratrix appealed, also, from the order denying the prayer of her petition for direction as to her further proceedings

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in reference to the sale of the land. The orphans court was right in that matter. The purchasers having failed to complete their purchase, it was the duty of the administratrix to proceed to a resale without further order. The order complained of will be affirmed, with costs.

In the matter of the propounding for probate of a paper writing, purporting to be the last will of ANN JANE ANDREWS, deceased, late of Jersey City.

1. The testamentary capacity of a testatrix who executed her will in the later stages of pulmonary consumption, established against the hypothetical opinions of experts as to the effect, upon the mind, of the medicines usually employed in such cases.

2. The charge of undue influence exerted on testatrix by her mother, her sole legatee and executrix, held not to be sustained, it appearing that testatrix had been obliged, by her husband's cruelty, to leave him and return to her parent's house; and that testatrix also desired her mother to have the care and custody of her infant, in preference to its father.

THE ORDINARY.

On the 6th of August, 1878, Mrs. Ann Jane Andrews, now deceased, then the wife of James B. Andrews, of Jersey City, executed an instrument of writing as her last will and testament, in the presence of Rev. Fernando C. Putnam, the pastor of the church she attended when in health, Edward D. Gillmore, esq., the lawyer employed to draw the will, and Mrs. Mary T. Chamberlain, a neighbor and acquaintance of the testatrix, as testamentary witnesses. Three days previous to the making of the will, the testatrix, who was ill of pulmonary consumption, left her husband's house, which adjoined that of her father, Isaac Cordukes, and went to the latter house, and she remained there until she died, which was on the 26th day of August, 1878, twenty days after the making of the will.

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The will was executed at her father's house, and with all due legal formalities; and the testamentary witnesses all testify to her capacity. By the will, she gave all her property to her mother, whom she constituted executrix. The testatrix was the second wife of Mr. Andrews, to whom she was married on the 1st of June, 1876. By him she had one child, a boy, born in September, 1877. Her property was never of large amount. She appears to have had about \$1,000, which were given to her by her relatives when she was married; \$500 of which were in cash (afterwards invested in a bond), given to her by her uncle Thomas, and \$500 in a bond, a present from her aunt, whose namesake she was. She had, also, a pair of diamond ear-rings, given to her by her uncle Jonathan, and a piano-forte, the gift of her mother. Besides these things she had a few trinkets and her wearing apparel. All the jewelry that she had received from her husband, she returned to him after she left his house, with the exception of one little ring; so that the property which, by her will, she gave to her mother, had all been received from her own family. Mr. Gillmore testifies in regard to the execution of the instrument, that the paper was signed on the 6th of August, 1878; that there were present the testatrix, Mr. Putnam, Mrs. Chamberlain and himself; that the testatrix was sitting in a chair near the bed; that he read the will to her and she signed it, the seal being on already; that he asked her whether she signed, sealed, published and declared it to be her last will and testament, and she answered that she did, and that he then asked her whether she requested Mr. Putnam and himself and Mrs. Chamberlain to sign as witnesses, and she answered that she did so request them. He further says that then Mr. Putnam signed his name as a witness, he, Mr. Gillmore, signed his, and Mrs. Chamberlain hers. He further says that the testatrix signed her name in the presence of these three witnesses; that they were present when he asked her whether she signed, sealed, published and declared it to be her last will and testament, and when she answered that she did, and that they were present when she requested them to sign as witnesses, and signed in the presence of each other and in her presence. He says, speaking on the

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subject of her capacity, that she seemed to understand clearly what she was doing, and after the will was executed, asked him whether her husband could keep or get (he says he forgets which expression she used) her property after that. Mr. Putnam says she seemed perfectly to understand the will she was executing, and the nature of the act she was performing; and Mrs. Chamberlain testifies to the same effect. Mr. Gillmore drew the will, and he testifies on the subject of his instructions for it, which he received from the testatrix. He says she inquired of him whether she could leave her property so that her husband would not get it, or could not keep it, and he told her he thought she could, and promised to draw the will. He says she spoke to him about her bonds, and said her husband had them; that he asked her if they had been converted into cash, and she said it was not by her consent that her husband had appropriated those bonds to his own use. He says she spoke also of the piano-forte, and said it was a wedding present. Mr. Gillmore also testifies that she spoke to him in reference to her child, and asked him if she could keep it; and he told her he thought she could, as long as she stayed at her father's house. A few days after that her husband began proceedings, by *habeas corpus*, to obtain the custody of the child.

The contestant is Mr. Andrews, and he resists the admission of the paper to probate as the will of his wife, on the ground of incompetency and undue influence on the part of her mother, her legatee and executrix. To the testimony of the testamentary witnesses, he opposes that of several physicians produced by him as experts in reference to the effect of the disease of the testatrix and the medicines administered (which were the usual palliatives and alteratives given in like cases), on the mind of the patient. As was to have been expected, their testimony is by no means of a decisive character. Indeed, it is of but little, if any, service in the judicial inquiry. To their hypothetical deductions is opposed the reality of the case in hand. In opposition to their conclusions as to what, on their hypotheses, the mental condition of the patient in the suppositional case should be, is the fact of what the mental condition of the patient, in the actual case, was.

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It is worthy of remark in this connection, that Dr. J. D. McGill and Dr. Theodore R. Varick, called as experts on the part of the proponent, testify to the fact which may be said to be within common observation, also, that the mind of a person ill of pulmonary consumption is but little, if any, affected by the progress of the disease or the medicines usually administered in such cases. Dr. Varick, to the question whether, in his judgment, there is anything in the presence of the ordinary symptoms of consumption of the lungs, together with such treatment as was given in the case in hand, to impair the patient's mind, so as to prevent him or her from doing ordinary business, answers, "Not at all; as a rule, the intellect remains intact. In my experience [referring to consumptive patients], the intellect has remained intact up to the last." And here it should be stated that Dr. Culver, Mrs. Andrews's physician, says not only that the testatrix had as much intelligence as an ordinary consumptive in her stage of the disease, but that she was one of those persons who could marshal their forces, and that she could do as much, perhaps, under the same conditions, as any one. When asked whether he would say that consumptives, as weak as she was on the day the will was made, and taking the same opiates which she then took, would be incapable of making a will, he answers in the negative, and, afterwards, says he does not think she was incapable of making a will. In the case under consideration, there is no evidence of any want of mental capacity on the part of the testatrix; but, on the other hand, the proof is clearly to the contrary.

The contestant insists, however, as before stated, that the testatrix was induced to make the will through undue influence, which he attributes to her mother, and perhaps the other members of her father's family, and other persons who were with her in her latter days. It is not necessary to consider at any length the testimony which has been adduced on the subject. Out of the great mass of it, a few decisive facts are deducible. The testatrix had left her husband's house because of his ill treatment of her before she left it in August, 1878. In October, 1877, she left him and went to her father's, giving as her reason that he had treated her cruelly, and abused and hurt her physically,

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and she was at that time desirous of obtaining a permanent separation from him on that account, and consulted counsel with a view to taking measures to that end, but returned to him on his promising that he would endeavor to be a better man and a better husband. On that occasion she was away from him for several days. The evidence is that the violence of which she complained was two blows which he struck her on the head with his fist, because, as he alleged, she had neglected to feed his horse. She left him again the 3d of August, 1878, as before mentioned. The cause of her leaving on that occasion was, as before, his unkind treatment of her. He was given to frequent and gross intoxication, and on such occasions was rude and violent towards her. In her condition of health, his treatment became insufferable. He was at war with her family, and ordered her mother out of his house, and finally, violently put her out of the room where she was with his wife. It is proved that on one occasion when he was drunk he came into the room and sat down on his wife's bed, and in so doing hurt her by sitting on her legs. She upbraided him for it, saying that he would kill her, or that she would die, to which he replied by saying, "Die and be damned." His language, was on some of those occasions, violent, abusive, profane and blasphemous. He made false and unfounded charges (even of criminal conduct) against her friends. He was frequently brought home in a state of extreme intoxication, to her great annoyance. Not one alone, but many witnesses testify to this conduct on his part, and he opposes to it practically nothing but his own bare denial. His testimony bears frequent internal evidence of its unreliableness, and the spirit in which it is given, and which throughout pervades it, makes it painfully apparent that he is actuated in this litigation by a desire to do as much injury as possible by means of it to his father-in-law's family, and that too, without regard to the memory of the testatrix. Irrespective of all other considerations, the weight of evidence is entirely against him. The estate for which this litigation, so great in its proportions, is carried on by him in such an inordinate manner, is of but small value, comparatively, at most. His wife's property at her death, according to

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His claim, did not include the bonds or the piano, and consisted only of her wearing apparel and her diamond earrings and some trinkets. On taking out letters of administration upon her estate, he gave bond in the sum of \$2500, but appears to have regarded that as much beyond what the value of the estate would reasonably require. One of the bonds he swears he converted into money, with his wife's consent, in her lifetime, and handed her the money, and he says she spent it in household expenses, and he claims to be the owner of the other by gift from her. He says she transferred the piano also to him, and that she therefore did not own it when she died. And here it may be remarked, as bearing upon his disposition in this litigation, that when he applied for the letters of administration he made oath, though he knew of the existence of the will, that his wife died without a will, as far as he knew and as he verily believed.

On the argument much stress was laid by his counsel on the fact that by the will the testatrix makes no provision for her infant child, but it is proved that she desired that the child, which was less than a year old, should be delivered to her mother, and it appears by her husband's own testimony that but a very short time before her death, when he asked her if there was anything that she wanted him to do, she, after telling him that she wished to be buried near her brother, desired of him that her mother might be allowed to keep the child, and he says he refused the request, saying that that could not be. Thus with her dying breath she declared her wish that her mother should have charge of her child. But it is further in proof that she said previously, on the subject of the support of the child, that her husband was able to provide for it, as in fact he was, and is. Irrespective, however, of all this, the amount and character of her property was not such as, under the circumstances, to lend aid to the opposition to the will from the consideration of its unnaturalness. That there was hostility between her family and her husband is beyond question, but it seems to have been occasioned, to a very great extent at least, by his treatment of her. It is equally clear that when the testatrix last left her husband, she

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was full of indignation against him, because of his conduct towards her, and that from that time she was not only not desirous of seeing him again, but was unwilling to do so. He had by his conduct wholly estranged her from him, and of her own accord she sought by means of her will to give to her mother, who she hoped might be permitted to take care of her child, whatever property she had, all of which had been derived from her own relatives, and none of it, except it may be some wearing apparel, from her husband.

The will will be admitted to probate, and the caveator will be required to pay the cost of the litigation.

CATHARINE WAGNER, appellant,

v.

SHARP et al., respondents.

Where all of the next of kin are children of brothers and sisters, they take *per capita*.

Appeal from decree of orphans court of Morris county.

Mr. J. G. Shipman and *Mr. G. M. Shipman*, for appellant.

Mr. H. C. Pitney, for respondents.

THE ORDINARY.

The question presented is in reference to the distribution of the personal estate of an intestate who left neither widow nor descendants, nor father or mother, or brother or sister, but whose next of kin were thirty-six nephews and nieces, the children of his nine deceased brothers and sisters. The orphans court directed that the distribution be made to the nephews and nieces *per capita*. The appellant, who is the only child of a sister of the intestate, insists that the distribution should be *per stirpes*,

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and not *per capita*. The statute provides that in case there be no children, nor any legal representative of them, then one moiety of the estate shall be allotted to the widow of the intestate, and the residue shall be distributed equally to every one of the next of kindred of the intestate who are in equal degree, and those who represent them; provided that no representation shall be admitted among collaterals after brothers' and sisters' children. And that in case there be no widow, all the estate shall be distributed equally to and among the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid, and in no other manner whatever. The English statute (*of 22 and 23 Car. II. c. 10*), of which the above is an almost literal copy, and, when the latter became part of our law, been so often and authoritatively construed on the very point raised by this appeal that the construction was then settled. *Walsh v. Walsh*, 1 Eq. Cas. 249; *Janson v. Bury*, Bunb. 157; *Durant v. Prestwood*, Atk. 454; *Stanley v. Stanley*, Id. 455; *Lloyd v. Tench*, 2

NOTE.—In the following cases the heirs or next of kin in equal degree took *per capita*:

In *Miller's Appeal*, 40 Pa. St. 387, one died intestate, leaving as his heirs at law the children of his three deceased brothers, one brother leaving one child, another four children, and the third nine children; also, *Kroul's Appeal*, 60 Pa. St. 382, *Thompson*, C. J.; *Davis v. Rowe*, 6 Rand. 355.

In *Stent v. McLeod*, 2 McCord Ch. 354, an intestate left a nephew, the son of a deceased brother, and four nephews and nieces, the children of a deceased sister, his next of kin.

In *Snow v. Snow*, 111 Mass. 389, the next of kin of an intestate were the son of a deceased sister and the four children of another deceased sister.

In *De Haven's Case*, 1 Clark (Pa.) 336, two brothers of an intestate died in their lifetime, one leaving one child and the other seven children.

In *Clifton v. Holton*, 27 Ga. 321, a testator gave certain property to H., but if H. should die before attaining twenty-one, then over to H.'s "blood relations of nearest kin, to be divided equally among them." H. died under twenty-one. When the will was made he had one sister, M., living, four children of a deceased sister, and seven of another deceased sister. M. died before the testator, but before H., leaving six children; see *Ennis v. Peutz*, 3 Radf. 387; *Mortimer v. Slater*, L. R. (7 Ch. Div.) 322.

In *Skinner v. Wynne*, 2 Jones Eq. 41, two daughters of an intestate died in their lifetime of their father, one leaving two children and the other one. See *Shleman's Estate*, 74 Pa. St. 42.

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Via. Sen. 277. It was established that where an intestate leaves brothers' or sisters' children, and no brother or sister, the children take *per capita* as next of kin, and not by representation. It is unnecessary, as it would be unprofitable, to do more than merely cite the cases. That construction has remained ever since undisturbed. 3 *Wm. Err.* 151-3; 2 *Kent's Com.* 100; *Poss's Trust, L. R. (13 Eq.)* 355. But it is urged that by the decision of the court of errors and appeals, in *Davis v. Vandervoort*, 8 U. S. Gr. 558, it is held that the right of representation exists among brothers' and sisters' children *inter sese*, where there is no unequal kinship—no brother or sister of the intestate living at his death. The language of the court, speaking of the proviso of the act, is:

"It has been well settled by the courts in England for over a century and a half, and always acted upon, so far as anything to the contrary appears, since the passage of the act, that the effect of this proviso is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin *per capita*, except in the one case of the children of deceased brothers

In *Person's Appeal*, 74 *Pa. St.* 121, a decedent had three children, all of whom died in his lifetime, the first leaving one child, the second one, and the third three.

In *Brown v. Taylor*, 62 *Ind.* 295, an intestate left no children, but the descendants of three children, viz., a son of his oldest son, a daughter and son of his second son, and two sons of his third son. See *Cox v. Cox*, 44 *Ind.* 368; *Bransford v. Crawford*, 51 *Ga.* 20.

In *McKinney v. Mellon*, 3 *Houst.* 277, the intestate's next of kin were the children of two deceased sisters of his father of the whole blood, and the children of four deceased sisters of his father of the half blood. See *Edwards v. Buckdale*, 2 *Hill Ch.* 416; *Hallet v. Hare*, 5 *Paige* 315; *Redd v. Clapton*, 17 *Ga.* 230.

In the following cases they took *per stirpes*:

In *Jackson v. Thurman*, 6 *Johns.* 322, A died seized of lands, leaving B and C, children of a deceased sister, and D, the son of a deceased brother, his heirs at law.

In *Clement v. Cauble*, 2 *Jones Eq.* 82, an intestate died leaving her surviving one child of a deceased brother, A., two children of another brother, H., and twenty-one grandchildren of H., the children of four of his deceased children, as heirs at law.

In *McComas v. Amos*, 29 *Md.* 120, an intestate left as his next of kin several nephews and nieces, and also several grand-nephews and grand-nieces. The latter were excluded, and the former took *per stirpes*.

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and sisters of the intestate, among whom alone, of the collaterals, the right to take *per stirpes* by way of representation may exist."

The case before the court was one of unequal kinship, and it was held that first cousins take the personal estate of the intestate, to the exclusion of children and grandchildren of other first cousins deceased. The question now raised was not before the court. But the language of the court is not indicative of any dissent from what was, up to that time, the established and accepted doctrine. The meaning obviously is, and that is all that the court intended to say, that the right of representation among collaterals is limited to brothers' and sisters' children, and does not apply at all to any case of collaterals where the next of kin are all more remote than brothers and sisters. The decree appealed from will be affirmed with costs, and a counsel fee of \$50 to the respondents, to be paid out of the estate before distribution.

In *Kennedy v. Kennedy* (Conn.) 1 *Swift's System* 286, a testator devised a portion of his estate among his relations, according to the laws of the state of Connecticut. He had five brothers and sisters, who all died previously to the making of the will, each leaving a different number of children. See *Pruden v. Paxton*, 79 N. C. 446.

In *Crump v. Faucett*, 70 N. C. 345, A died seized of real and personal estate, leaving him surviving three grandchildren by a son and five by a daughter, both son and daughter having died before A.

In *Odam v. Caruthers*, 6 Ga. 39, decedent left a wife and two grandchildren, the offspring of a deceased son, and seven grandchildren, the offspring of another deceased son. See *Brenneman's Appeal*, 40 Pa. St. 115.

As to constructions of testamentary gifts to nephews and nieces, see 2 *Jarm. on Wills* (5th Am. ed.) 697; also, *Harris's Estate*, 74 Pa. St. 452; *Curry's Estate*, 39 Cal. 529; *Thornton v. Roberts*, 3 Stew. Eq. 473; *Dildine v. Dildine*, 5 Stew. Eq. 78; *Brower v. Bowers*, 1 Abb. App. Dec. 214; *Grant v. Grant*, L. R. (2 P. D.) 8, 5 C. P. 380, 727; *Hibbert v. Hibbert*, L. R. (15 Eq.) 372; *Weeds v. Bristow*, L. R. (2 Eq.) 333; *Sherratt v. Mountford*, L. R. (15 Eq.) 305, (8 Ch.) 928; *Wells v. Wells*, L. R. (18 Eq.) 504; *Payne v. Rosser*, 53 Ga. 662; *Cosgray v. Core*, 2 W. Va. 353.—REP.

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PETER Q. WILSON et al., appellants,

v.

PETER P. STAATS, executor &c., respondent.

1. An executor is justified in paying the funeral expenses of an indigent sister of the testator, for whose use for life the income, and, if necessary, the principal, of one-half of his residuary estate had been given. In such case the funeral expenses are necessities.

2. An executor's investment on a first mortgage on lands, worth at the time, one-third more than the amount loaned, approved, although loss to the estate subsequently happened; an investment on a second mortgage, exceeding, with the first mortgage, two-thirds of the value of the premises, condemned.

3. An executor holding a bond and mortgage of one who makes an assignment for the benefit of his creditors, and whose estate pays a dividend, is in laches in not presenting the claim on the bond to the assignee.

4. *Seem*, an executor who resells lands bought in by him on foreclosure of mortgages of the estate, need not advertise as on a public sale under the statute.

5. Commissions allowed, no bad faith being shown.

Appeal from decree of Somerset orphans court, on exceptions to the final account of the respondent, executor &c., of Henry M. Wilson, deceased.

Mr. John Schomp, for appellants.

Mr. H. M. Gaston, for respondent.

THE ORDINARY.

The objections brought before the court for examination and adjudication, will all be disposed of by a decision of the follow-

NOTE.—Even where an estate is insolvent, the representatives may be allowed the expenses of a funeral, suited to the condition of the decedent during life (2 *Wms. on Exrs.* 968; *Scott v. Dorsey*, 1 *Harr. & Johns.* 233; *Edwards v. Edwards*, 2 *Crompt. & M.* 612); and such debts are preferred to those of the government (*United States v. Eggleston*, 4 *Sury.* 199. See *Rex v. Wade*, 5 *Pricer* 621).

An undertaker may recover of the executor, if employed by him (*Rooney* 3 *Redf.* 15; *Green v. Salmon*, 3 *Ad. & El.* 348; *Arbat v. Churchland*,

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g questions: whether the executor had authority, under the provisions of the will, to provide, out of the residue of the estate, for the burial of the testator's sister Jane, to whom and his other Dowe the use of the residue was given for life; whether the investments of the money of the estate on mortgage of the Voorhees and Wallace properties, respectively, were proper; whether the executor ought not to have proved the debt on the Wallace bond, under Wallace's assignment for the benefit of his creditors; whether the executor's sale of the property obtained under foreclosure of the Wallace mortgage was on lawful notice, and whether the executor is entitled to any commissions, and if so, at what rate.

The will gave all the residue of the estate to be divided equally between the testator's sister Jane and his brother Dowe, "the money to be put on bond and mortgage, and the interest to be paid to them yearly, for their support;" with the further provision that, "if the interest should prove insufficient for the purpose, then so much of the principal as might be necessary for the purpose, should be applied thereto." These two persons, the legatees, were both poor. One of them appears to have been very sick and imbecile in mind. The testator intended to devote to their support, for life, the entire residuum of his estate, if necessary for the purpose. He first provided that they should have the residue in equal shares; this is followed

in *Lucy v. Walcott*, 3 Bing. N. C. 841; *Meert v. Moessard*, 1 Moo. & P. 8).

When furnished at the request of a third person, query as to the executor's liability (*Rogers v. Price*, 3 You. & Jer. 27; *Brice v. Wilson*, 3 Nev. & M. 512; *Ance's Estate*, 75 Pa. St. 220; *Walker v. Taylor*, 6 C. & P. 752; *Corner v. Cox*, 3 M. & W. 350; *Gregory v. Hooker*, 1 Hawks 392; *Fitzhugh v. Fitzhugh*, Gratt. 300; *Hewett v. Bronson*, 5 Daly 1).

As to the representative's personal liability (*Ferrin v. Myrick*, 53 Barb. 76, N. Y. 315; *Rappelyea v. Russell*, 1 Daly 214).

A coffin and grave clothes purchased by defendant for his mother-in-law, who died a member of his family, were deemed necessaries (*Thompson v. Smith*, 57 N. H. 306. See *Cumden v. Fletcher*, 4 M. & W. 378; *Meert v. Moessard*, 1 Moo. & P. 8).

If paid by the heir at law voluntarily, he cannot be re-imbursed from the personalty of intestate (*Coleby v. Coleby*, 12 Jur. (N. S.) 496).

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by the direction that it be invested on bond and mortgage, and the interest paid to them yearly, for their support, and he then adds that if the interest should prove insufficient for the purpose, the principal should be used as far as might be necessary. His language was, "and if the interest should prove insufficient then so much of the principal must be taken to do it." At the death the principal, or what remained of it, was to be divided among certain persons, whom he designated, as follows: "Among my nieces and nephews, sons and daughters of Dowe, sons and daughters of William, sons and daughters of Minard, son of Jane." It is reasonable to hold that under the provision made by the will for Dowe and Jane, neither of whom had any property, expenses of their decent burial, if borne by the executor or trustee, would be allowable credits in his account. He paid the expenses of the burial of Jane. It cannot be doubted that the testator contemplated that the expenses of such burial should, if necessary, be paid out of the residue. It seems to have been necessary for the executor to provide for Jane's burial, and the amount expended for the purpose appears to have been reasonable. The funeral expenses were necessities.

To consider the investments made by the executor. One, of \$5,000, was on mortgage of the Voorhees property, a farm of seventy-nine acres, in Hillsborough township, in Somerset county, and

A son is not liable on a parol promise to pay an undertaker for making his mother's coffin, where she had remarried, and at the time of her death was living with her husband (*Youngs v. Shough*, 3 Green 27).

Nor is a pauper under obligation to borrow the money necessary to bury his child (*Reg. v. Vann*, 15 Jur. 1090. See *Kavanan's Case*, 1 Me. 226).

A step-father was allowed the funeral expenses of his step-son, who was a lunatic, out of his lands (*Carter v. Beard*, 10 Sim. 7).

Even where a wife has a separate estate, her husband is liable for her funeral expenses (*Chapple v. Cooper*, 13 M. & W. 259; *Patterson v. Patterson* 59 N. Y. 583; *Smyley v. Reese*, 53 Ala. 89; *Sears v. Gidley*, 41 Mich. 590; *Weld v. Walker*, 14 Am. Law. Rev. 57. But see *Gregory v. Lockyer*, 6 Mad 90; *Willeter v. Dobie*, 2 K. & J. 647; *McCord v. McKinley*, 92 Ill. 11; *Che v. Garvey*, 14 Hun 562, 3 Redf. 313).

Although living apart (*Jenkins v. Tucker*, 1 H. Bl. 90; *Ambrose v. Kerr* 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. (N. S.) 344; *Cunningham v. London*, 98 Mass. 538).

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her, of \$2,000, was on a second mortgage of a lot in Millstone, a store, dwelling-house and barn thereon. The history of the investments appears to be as follows: at the settlement of the first account, the executor had in hand for investment, as residue of the estate, the sum of \$6,981.28. The settlement took place in 1864. In the spring of 1865, he lent to one Gabriel, on mortgage of his farm, \$4,000, and afterwards, in the spring, he lent \$5,000 to Abraham Voorhees, on his farm as mentioned. It is obvious that after the loan to Gabriel, he did not \$5,000 to lend to Voorhees, but only about \$3,000. In order to make the loan of \$5,000, he added \$600 of his own money and \$1,400 of the money of his brother John to the residue of the estate. Gabriel, in 1869, paid off his mortgage, and out of the money received from him, the executor paid his brother John his \$1,400 and retained his own \$600. The balance of the money, \$2,000, he invested in April 1869, on a second mortgage of the Wallace property, which consisted, as he stated, of a lot (of thirty-six hundredths of acre) in Millstone, on which was a store-house, dwelling-house, and barn, on which property there was already a mortgage for \$1,300. Interest was regularly paid on the Voorhees mortgage up to 1877. In that year only \$200 of the interest were paid. In 1878 only \$50, and in 1878 \$350 were paid. No payment was made in 1879, and the executor then proceeded to foreclose the

either paying funeral expenses renders one an executor *de son tort* (see *Wright v. Fletcher*, 4 M. & W. 378; *Harrison v. Rowley*, 4 Ves. 216; *Bennett v. Bennett*, 30 Conn. 329; *Magner v. Ryan*, 19 Mo. 196).

A direction to a person to pay the expenses of a last illness and funeral expenses, in case of death, out of a particular fund, will not constitute him executor according to the tenor (*Toorney's Case*, 3 Sw. & Tr. 562). Nor a direction to a legatee to pay such expenses out of his legacy (*Smith's Case*, 10 Jur. 1084).

A direction may be granted to one who has supplied funeral expenses, as creditor (*Fowler's Case*, 16 Jur. 894; *Newcombe v. Beloe*, L. R. (1 P. & M. 14).

If the estate be insolvent the usual amount allowed is £20 (*Yardley v. Arden*, 4 M. & W. 434); and £103 was held to be too much (*Edwards v. Edwards*, 11 P. & M. 612); the amount is generally discretionary with the court (*Scott v. Scott*, 1 Harr. & Johns. 233).

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mortgage. At the sheriff's sale under foreclosure, the property was sold for \$3,460. It was not bought in. The Wallace property was sold in the fall of 1871, under foreclosure proceedings instituted the previous summer by the executor on his mortgage, and was bought in by him for the estate, for \$1,500, subject to the first mortgage. He held it until the winter of 1879, when he sold it at public sale to Henry McDonald, for \$2,000.

In the spring of the year in the summer of which the executor began the foreclosure suit on the Wallace mortgage, Wallace made an assignment for the equal benefit of his creditors. The executor did not put in his claim under it. The claims of the creditors who did so were compromised by the assignees, to the payment of forty cents on the dollar.

It appears that Abraham Voorhees paid for the Voorhees property \$8,482, about \$108 an acre. The time when he purchased it does not appear, but it seems to have been about the time of the giving of the mortgage. If its value was then \$8,428, the amount lent upon it, \$5,000, was less than two-thirds of the value. The interest was paid regularly for ten years, up to 1876. In that year \$200 were paid for interest; the next year \$50, and the next \$350, and the payment of interest having ceased, the executor, in 1879, began to foreclose. I do not think that he is answerable for the loss to the estate on that loan. The mortgage was taken in 1865. Between that time and 1873 the

The cost of ordinary mourning apparel for the family of the decedent, may be sanctioned (*Campfield v. Ely*, 1 Green 150; *Wood's Estate*, 1 Ashm. 314; *Pitt v. Pitt*, 2 Lee 508; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Bridge v. Brown*, 2 You. & Coll. 186; *Frederic v. Frederic*, 10 Mart. 188; but see *Griswold v. Chandler*, 5 N. H. 492; *Johnson v. Baker*, 2 C. & P. 207; *Macknet v. Macknet*, 9 C. E. Gr. 296; *Holbert's Succession*, 3 La. Ann. 436; *Flintham's Appeal*, 11 S. & R. 16); and the cost of a wake (*McCue v. Garvey*, 14 Hun 562).

The expenses of a tombstone have been held allowable (2 Wms. on Exrs 969, note; *Ferrin v. Myrick*, 53 Barb. 76, 41 N. Y. 315; *Luckey's Case*, 4 Red 95; but see *Foley v. Bushway*, 71 Ill. 386; *Morgan v. Morgan*, 83 Ill. 19; *Lerch v. Emmett*, 44 Ind. 331; *Erlacher's Case*, 3 Redf. 8; *Bridge v. Brown*, 2 You. & Coll. 185).

The expense of a *post mortem* is not authorized (*Smith v. McLaughlin*, 7 596); nor moneys spent to procure the arrest, trial and punishment of decedent's murderer (*Lusk v. Anderson*, 1 Metc. (Ky.) 426; *Jones v. Be*

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price of real estate rose. In the latter year a great revulsion took place, and it fell enormously. The executor swears that when the mortgage was taken he considered that the property, without the buildings (it is said that such a house as that on the farm would now cost \$4,000), was worth the amount of the mortgage. He contributed of his own funds \$600 to the loan. His brother John, who contributed \$1,400, as before stated, testifies that he considered the property worth \$100 an acre at the time the loan was made. No witness is produced to say that the property was not a good security when the mortgage was taken, and I am left to conclude that the security was abundant when the loan was made, and that the loss sustained is due to the depreciation which attended the great revulsion before referred to. One of the witnesses, John W. Smock, says that if the property had been kept in good repair, he would not consider it worth now more than half what it would have brought eight or ten years ago.

The Wallace property was of a different character. It was a valuable village property. It is said to have been the best stand for business on that side of the river. Ryneer S. Merrell testifies that when the executor obtained his mortgage on it, he (Merrell) thought it a good security for that loan, and he also says it had been sold for over \$4,000. The executor testifies that when he made the loan he knew the property had been sold for \$4,300

Id. 171. See *Killebrew v. Murphy*, 3 Heisk. 546; *Harrell v. Davenport*, 5 Jones 4; nor for feasts or ornaments (*Shelley's Case*, 1 Salk. 296; *Toller's Err.* 46); nor for writing funeral notices and procuring a clergyman to officiate (*Hewett v. Bronson*, 5 Daly 1); nor for the use of plaintiff's house during the funeral ceremonies (*Ibid.*). *Littell's Case*, MS. N. J. Prerog. Ct., Oct., 1876.

Decedent's lands may be sold to pay his funeral expenses (*Walker v. Diehl*, 9 Ill. 473; *Clayton v. Somers*, 12 C. E. Gr. 230; *Owens v. Bloom*, 14 Hun 296. See *Carter v. Beard*, 10 Sim. 7).

If sued by an administrator for a debt of his intestate, the defendant may offset a demand for money paid by him for intestate's funeral (*Adams v. Butts*, 6 Pick. 343; *Patterson v. Patterson*, 59 N. Y. 574. See *Harte v. Houchin*, 50 Ind. 327).

Counts for funeral expenses cannot be joined with counts on promises made to the testator in his lifetime (*Myer v. Cole*, 12 Johns. 349; *Demott v. Field*, 7 How. 58. See, further, 10 Cent. L. J. 303, 325).—REP.

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just before the mortgage was given, which was in 1864. He got the mortgage by assignment in 1869. The interest on the first mortgage, which was for \$1,300, was paid up until the year before the executor foreclosed his mortgage. It is said that between the time when the \$2,000 mortgage was given and the time when the executor took his assignment of it, property in Millstone rose in value; but if it did, it does not appear how much. Both mortgages on the property were purchase-money mortgages. I have no doubt the executor regarded this as a proper investment when it was made, notwithstanding it was a second mortgage, but I am constrained to the conviction that it was not. The two mortgages together amounted to almost four-fifths of the value of the property, judging by the price it brought in 1866, and if it appreciated at all between that time and 1869, when the executor took the assignment, it does not appear by any evidence that it appreciated enough to make the loan on the second mortgage a safe one; and there is indeed no evidence that it appreciated at all. Nor will the executor's allegation that he could not find a better security avail to discharge him from responsibility. It does not appear that he tried to find any after the money was paid in by Gabriel. Though he says, in the beginning of his testimony, that he could get no place to invest the money on first mortgage for some time, subsequently he says he had the money on hand about a week before he invested it in the Wallace mortgage, and he adds that he had promised the money to Beardsley, who assigned the mortgage to him. He says Gabriel paid him the money in April. It must have been the 1st of that month, for the assignment from Beardsley to the executor is dated the 2d of April.

Again, the executor did not discharge his duty to the estate in regard to the claim which the personal responsibility of Wallace on the bond enabled him to make on the property of Wallace not covered by the mortgage. He says he did not put in his claim against Wallace's estate in the hands of the assignees, because he held a mortgage. If the mortgaged premises were worth the amount of the mortgage at that time, he should have got the money for his mortgage. Mr. Smock, one of the assign-

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as of Wallace, says he offered \$3,500 for the property then, and he considered it worth about \$4,000. At the same time, he says the assignees offered it for sale, and could get no offer or bid for it. He appears to have been in the occupation of the property at the time as a tenant, and perhaps was therefore willing to buy it. It may be added that it does not appear that the property was as then—in the spring of 1871, before the financial panic occurred—worth more than \$4,000. Elmendorf, the other assignee of Wallace, says Smock was anxious to buy, and that he (Elmendorf) thought the price Smock offered (which was \$3,500) was the full value of the property. But further, the executor might have put in his claim under the assignment, and if he had done so he would have been entitled to a dividend on the amount of any deficiency left after applying the proceeds of the sale of the mortgaged premises to the payment of his debt. *Bell v. Fleming's Exrs.*, 1 Beas. 13. His omission to do so was a dereliction of duty. As before stated, the estate paid, on compromise, forty per cent. The executor should be held responsible for the loss on this loan, and therefore all his claims for allowance in respect to the property after it was bought in by him must be disallowed, and of course the charges against him for rents received from it will be stricken from the other side of the account. I have no doubt he acted honestly in the matter of this loan, but he not only took a second mortgage for security, but he did not observe the rule by which prudent business men are governed in their investments of their own money on mortgage of real estate, not to lend to the extent of more than two-thirds of the value of the property. I am constrained, therefore, to visit the loss on him rather than on the estate.

While this conclusion renders it unnecessary to pass on the question raised as to whether the executor, if that property was the property of the estate when he sold it, was not bound to advertise it according to the directions of the act "relative to sales of land under a public statute or by virtue of any judicial proceedings" (*Rev. 1040*), it may be remarked that the sale was not within the provisions of that act.

The executor has not, I am satisfied, been guilty of any intentional wrong or misconduct in the discharge of the duties of his

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office, and he ought not, therefore, to be deprived of his commissions. The commissions will be computed according to the rule laid down on the subject in *Tucker v. Tucker*, 6 Stew. Eq. 235; that is, he is entitled to commissions on the amount on which he is to be allowed commissions in the third or final account at the same rate at which they would have been allowed had the money on which they are computed constituted part of those accounted for in the former accounts. He is to be allowed commissions only once on the entire estate, notwithstanding the several accountings, and that only at the statutory rate, taking all the sums on which commissions are computed together, and applying the statute thereto accordingly.

The decree of the orphans court will be reversed in the respects above indicated, but without costs.

HANNAH YOUNMANS et al., appellants,

v.

LUTHER Y. PETTY, respondent.

Where a contest over the probate of a will has been duly certified into the circuit court, and the proceedings there appear to have been regular, and the verdict of the jury properly certified into the orphans court, and a decree in conformity with the verdict entered, objections addressed to the discretion of the circuit judge and overruled by him, or objections which, if raised at all, ought to have been raised in the circuit, are no ground for reversing the decree of the orphans court.

On appeal from a decree of the orphans court of Warren county refusing probate of a paper writing purporting to be the will of John M. Youmans, deceased.

Mr. J. F. Dumont and *Mr. H. S. Harris*, for appellants.

Mr. J. G. Shipman, for respondent.

Youmans v. Petty.

THE ORDINARY.

The appeal is from the decree of the orphans court of Warren county, refusing to admit to probate a paper writing purporting to be the last will and testament of John M. Youmans, deceased. The appeal is from the whole of the decree except so much as awards costs and counsel fees, and the ground of appeal is that the decree is, with the exception before mentioned, erroneous in every part, because the circuit court of Warren county should have decided that the paper is the will of John M. Youmans, deceased, and should be admitted to probate accordingly. It will be perceived that the objection is to the result of the litigation in the circuit court, into which, for trial before a jury, the question involved in the controversy over the instrument was certified by the orphans court, on application in behalf of the caveator. By the record, the question appears to have been duly certified into the circuit court, and the issue there appears to have been duly framed, and the cause duly tried. The verdict of the jury was certified to the orphans court, and the circuit judge certified, also, that there was no request that the testimony or charge be reduced to writing; that no exception was taken, either to the rulings of the court or the charge, and that there was a motion on behalf of the proponents for a new trial, and a motion that the cause be certified hereon into the supreme court, both of which were denied. They were both in the discretion of the circuit judge. I am unable to find any error in the decree complained of. The act (*Rev. 756 § 19, 20*) authorizes the orphans court, on application of either party to a contest over a will, to certify the questions involved into the circuit court of the county, for trial before a jury, and it provides that the verdict shall be subject to be set aside, and a new trial granted in the circuit court, as in other cases in that court, and that the circuit judge may, on the application for a new trial, certify the application to the supreme court for its advisory opinion. It also provides that on the certificate of the circuit judge the orphans court shall proceed to make a decree touching the probate of the will, in accordance with the finding of the issue in the circuit court. There does not appear to have been any objection in the orphans court to the making of the

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decree in accordance with the finding of the circuit court. And though there was objection to the action of the court in certifying the question into the circuit court, the order that the question be certified was not appealed from, and it may not be out of place to remark that if it had been, there appears to have been no error in the exercise of the discretion which the act gives to the orphans court in the matter. The decree will be affirmed, with costs.

PHILIP SCHAEDEL, guardian, appellant,

v.

HENRY REIBOLT, administrator, respondent.

Where appellant took into his own family an orphan, and educated and supported her until she was sixteen years old, when she went elsewhere to work, and received her own earnings for a time, but becoming sick she returned—*Held*, that appellant was entitled to recover from her estate the expenses of her last illness and funeral. *Aliter*, as to clothing and board furnished.

Appeal from decree of Essex orphans court.

Mr. S. Morrow, for appellant.

Mr. E. Q. Keasbey, for respondent.

THE ORDINARY.

The appellant, Philip Schaedel, and his wife, took the deceased ward, Augusta Reibolt, out of the Newark Orphan Asylum, where she had been placed for support at the hands of charity. She was then about seven years old. They appear to have taken her to bring up, and they seem to have reared and cared for her, not only up to the time when, at the age of about sixteen, she left their house to go out to service, but afterwards, whenever she returned to them, and during her long, last illness (which was

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any months), as tenderly as they would had she been their child. She went to service of her own choice, and while at it she regarded their house as her home, and returned to it from time accordingly. They swear that she received and kept for her own use all the wages which she earned. She learned the trade of dressmaking in Newark, while she lived with them. While she was living with them, and before she went out to service, she was entitled to some money from her grandfather's estate. That money was in the hands of Henry Sauerbier as guardian, he having been duly appointed as such. While she was at service in Paterson, she became apprehensive lest she might lose her money through the insolvency of Sauerbier, and procured the appointment of Schaedel as her guardian, and he procured the money from Sauerbier. Early in the fall of 1877, she returned to Schaedel's house sick of pulmonary consumption, and lay there until she died, on the 18th of March following. Schaedel provided for her well during her illness, and had her decently buried after death. He claims credit in his account of guardianship for payments made for her in the changing of clothes, for money paid for collecting the money from Sauerbier, for compensation for her board &c., including care and attendance and physician's bills in her illness, and for money paid for funeral expenses, to an amount in the aggregate very considerably exceeding the money received by him for her as her guardian, and the interest thereon. Her administrator, however, excepted to all these credits, and they were all disallowed. He insists that Schaedel was bound to furnish the board, care and attendance, and medical aid for which he claims credit without compensation or re-imbursement therefor; and so, too, as to the expenses of her funeral, that he was bound to pay them, and that he has no claim against her estate on account of those expenses, or any of them.

The proof is, as before stated, that the appellant and his wife did their whole duty towards Augusta, and cared for her as if she had been their own child, from the time when they took her from the orphan asylum until her death. They sent her, not only to the public school, but for three years, at Schaedel's expense, to a private school; and they not only

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educated her in the ordinary branches, but employed teachers to instruct her in book-keeping and in music. She went to school till she was fourteen years old. For the last three years of the time she went to a private school. After she became fourteen years old, she, as before mentioned, learned the business of dress-making, but lived with them all the time, and they clothed her. She appears to have left their house of her own accord when she was about sixteen years old, to work for herself, and continued to work on her own account, at various places in the neighborhood of Newark, until early in the fall of 1877, when Mr. Schaedel dissuaded her from going out any more, because of her failing health, and she thenceforward, until her death, which occurred in March, 1878, lived with them, but as before stated, was sick of consumption. The proof is that she kept her own wages, and spent them in clothes &c. Miss Cullman, indeed, swears that on one occasion she saw her pay \$12 to the appellant's wife, which the witness says she had brought from a place in Broad street (she was at one time employed at service at Mr. Lockwood's house in that street), but this is positively denied by Mrs. Schaedel, and both she and her husband swear unqualifiedly that they never had any of her earnings. Her brother's testimony as to what he says Augusta told him on the subject is, of course, incompetent. Miss Cullman says Augusta began to be ill in August or September, 1877, but adds that she was frequently sick before that time and had a doctor. It appears quite clear that the *quasi* parental relation which before then had existed between Augusta and Schaedel terminated when she, of her own accord, went out to work for herself, and the fact that she regarded his house as her home, and returned to it as such in the intervals of employment, would not affect that conclusion. For the time that she was a member of his family previously, he could have no claim against her for necessaries furnished to her, nor she any against him for her services rendered in the family. *Haggerty v. McCanna*, 10 C. E. Gr. 48. And so, too, to a certain extent with regard to the same matters when she returned from time to time to his house as her house. It appears, it should be remarked, that she stayed at his house during such

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intervals of employment for considerable periods, at one time all winter, and at another (in 1877) from April to August. Her board (and clothing, too, if he provided it on such visits or stays) he would be regarded as giving to her, in view of their relations, unless it was otherwise understood between them. But neither justice nor law required him, under the circumstances, to pay her physician's and nurse's bills during her long illness, which resulted in her death, and finally to bury her at his own expense; and neither justice nor law forbids his being indemnified for those payments out of her estate, but, on the other hand, both require the contrary. The appellant should be allowed all his charges except that of \$667.50 (made, he swears, by advice of counsel), under date of April 30th, 1876, which is for board and clothing of Augusta from October 1st, 1867, to April 30th, 1876, and the charge of \$40 under date of July 15th, 1876, for her board and washing during her sickness from May 1st, 1876, to July 15th, 1876. The court below appears to have ordered him to pay out of his own pocket a counsel fee of \$25 to the exceptant's counsel, and the costs of the trial of the exceptions, and the costs of settling the account. Those ought all to be paid out of the estate.

The decree of the orphans court will be reversed, and the account restated here in accordance with the views expressed in this opinion.

ROSEANNA MERRILL, appellant,

v.

WILLIAM J. RUSH, executor, respondent.

The testamentary capacity of a testatrix eighty-three years of age when her will was executed, who mentioned twenty of her intended legatees to her scrivener, and noted the omission of one of them when he read the will over to her, supported by the testimony of the surviving attesting witness and scrivener of her will, and by her physician and other witnesses, established, although her

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forgetfulness in regard to some minor matters was shown, and it appeared that she had made an unjust and unfounded accusation against a person who, however, had no natural claims upon her bounty.

Appeal from the decree of the orphans court of Warren county, admitting to probate the will of Rachel Rush, deceased.

Mr. Henry S. Harris, for appellant.

Mr. L. De Witt Taylor, for respondent.

THE ORDINARY.

The appeal brings up for consideration the question whether a paper purporting to be the last will of Rachel Rush, deceased, late of the county of Warren, and executed by her as such, shall be admitted to probate. The testatrix, at the time of her death, October 8th, 1878, was of very advanced age, being a little over ninety. When the will was made she was over eighty-three years of age. It was made, then, about seven years before she died. By it, after ordering the payment of all her just debts and funeral expenses, she gave to certain of her grandchildren, by name, \$50 each; to Rachel Rush, daughter of her son, Peter J. Rush, her feather bed and bedding and \$50; to the daughters of her deceased daughter Margaret, \$50, to be divided among them equally; to the Baptist church of Montana, Warren county, \$50; to her six daughters-in-law, \$100 each, and to her two daughters and six sons the residue of her property; and she appointed her son, William J. Rush, executor. Of the testamentary witnesses, only one, James Vliet, is living. He drew the will. It is dated January 11th, 1871, and was executed on the day, or the day after, it bears date; probably the former.

Mr. Vliet had drawn two wills previously to this for her, and he drew this at her request. She appears to have sent for him to get him to draw it, and he went to her place of residence at the house of her son, Peter J. Rush, where she had lived for many years. She told him that she wanted to make some alter-

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ions in her will, and he made a note, at the time of the alterations, which she wished to make. He drew the will accordingly, and returned with the paper to the same house the next day. When he arrived there he and she retired to a separate room, and he then read the will to her. As he read it she perceived that he had omitted one of the persons to whom she desired to make bequest—Mary M. Beers, daughter of her daughter Maria—and remarked that he had left her out. He thereupon made the correction, by interlineation, and finished reading the will to her, and she pronounced it to be right. At his first call upon her, he spoke to him about procuring a witness, and it was understood between them that he would see Martin H. Tinsman, and bring him with him to witness the execution of the will with him. He brought Tinsman accordingly, and the latter, with Mr. Vliet, witnessed the execution of the will by her. As before stated, Tinsman is dead. The will was executed with all due legal formalities. The attestation clause is as follows :

“Signed, sealed, published and declared by the above-named Rachel Rush, to be her last will and testament, in the presence of us, who were present at the same time, and subscribed our names as witnesses in the presence of the testator and each other.”

The attestation clause is perfect, and it may be added that the proof *aliunde* establishes all the requisites of the statute. After the will was executed, Mr. Vliet inquired of the testatrix what directions she would give as to the custody of the paper. She said she desired him to retain it, and he did so, from that time up to a few days after her death. He was well acquainted with her. As before stated, he had drawn two previous wills for her. One was executed in March and the other in June, 1868, and he had had the custody of them. They remained in his custody after cancellation, and appear to be there still. He testifies that the will was drawn in conformity to her directions, and that at the time of the execution of the paper she was of sound and disposing mind, memory and understanding. There is no proof whatever of the exercise of undue influence over her in the making of the will. Its admission to probate is resisted,

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on the ground that when it was made she had not testamentary capacity. In the will she makes bequests to more than twenty of her grandchildren, making mention of them by name in every instance but one (the daughter of her daughter Margaret), with correct reference to their parentage. She mentions each of her daughters-in-law, and makes a bequest to each, and then gives to her daughters and sons the entire residue of her property. She gave to Mr. Vliet the instructions for that will, as before stated, and he testifies that no one except him and her was present at the time. It is urged, on behalf of the caveatrix, that the testatrix was under delusions in regard to an injury done to a horse belonging to her, from which it died, and also as to certain small articles of household furniture of little value, which she alleged had been stolen from her. The injury referred to she imputed to Charles B. Rush, and the theft to his wife. She lived with them from the death of her husband, which occurred in the fall of 1867, until the spring of 1868. The horse was with her there. She appears to have been very much attached to it. While she was there she charged Rush with having unduly worked it, and there were unpleasant, not to say unfriendly, words between them on the subject. The horse was not injured, and did not die at his place, but at her son's, where she lived at the time. Her suspicion or belief that Rush had maliciously done the injury which resulted in the death of the horse was unjust to him, but it evidently arose from her state of feeling towards him in connection with the difficulty before referred to, which had occurred between them in respect to the horse. As to the household articles which she charged his wife with having stolen, the latter testifies that some of them were given to her by the testatrix, and it appears that as to the others, certain dishes, the testatrix had given them to her daughters, and had probably forgotten the fact. The hallucinations, if such they may be called, had no reference, however, to any person who had reason to expect to be a recipient of her bounty, or who had any claims by nature upon her in her distribution of her estate. There is no evidence that they in anywise affected her testamentary disposition of her property, and if there were evidence that it had

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one so, probate of the will would not be denied on that account where the denial would not avail those who, but for the delusion, would have been recipients of the testator's bounty. *Stackhouse v. Horton*, 2 *McCart*. 202. Her conviction as to the cause of the death of the horse was the offspring of the ill opinion which she had of Charles B. Rush. In the charge made against his wife in respect to the dishes, there is evidence of failing memory.

It appears, however, affirmatively, in respect to both these charges, that she readily yielded to the considerations which would convince a sane mind. Asa Kinney, a witness sworn in behalf of the caveatrix, says that after he told her she could not punish Rush for the injury to the horse, because she could not prove that he was on the ground when the injury was done, she gave the matter up. She seems, also, to have accepted the statement of her daughter that the dishes had been given by her to her daughters. It is charged, also, that the condition of her mental and bodily health was such, while she was living with Charles B. Rush, from the fall of 1867 to the spring of 1868, as to indicate testamentary incapacity, but the circumstances adduced are evidence only of the failure of memory in reference to recent matters, incident to old age, and a disregard of the proprieties of life with respect to cleanliness. As to this latter circumstance, the proof depends wholly on the testimony of Rush and his wife. She lived with them, as before stated, from the fall of 1867 to the spring of 1868. She lived nearly ten years after she left their house. She lived at three different places afterwards. If her mind was so far gone when she lived at Charles B. Rush's as that she had, by reason of want of mental capacity, no regard for the decencies of life (for what is charged upon her is said not to have been done through or when she was in a state of illness), it is remarkable that the like evidence of insanity was not found in her conduct afterwards. It is reasonable to suppose that Dr. Hulshizer and Mrs. Fangboner, of whom more particular mention will be made hereafter, should not have known of any such evidence of incompetency. The opinions of witnesses other than the testamentary witnesses or experts, are not competent on the subject of capacity. The testimony of Mr. Vliet has already

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been adverted to. Dr. Hulshizer speaks of the testatrix, during the last few years of her life, from a period prior to the year 1872. As before stated, the will was made in January, 1872. He testifies that he attended her at different times from a period probably shortly before 1872 to her death, but that she did not require any particular attention from a physician; that the condition of her health during the time that he knew her was good, and that he talked to her several times, and took pleasure in talking to her, on account of her age. He says that he never saw anything that would lead him to question her competency; that in the conversations that he had with her, she would be very explicit in recounting to him the occurrences of her past life; that from what she would tell him on those occasions, he thought her mind was remarkable; that she always recognized him, and that prior to the last two or three years of her life, he never saw anything that led him to believe that she was not of sound mind. Mrs. Fangboner, who knew the testatrix from May, 1869, up to the time of her death, and was intimately acquainted with her—sometimes, as she says, seeing her every month, and in 1874, being at the house where the testatrix lived, from April to October, all the time, and prior to that time, as she testifies, having seen the testatrix every month—had frequent opportunities of observing her mental condition, and appears from her intelligence to have been able properly to estimate the qualities of the testatrix's mind. She testifies that she frequently conversed with the testatrix, when she was there at the house, and while she lived there, as above mentioned, she conversed with her every day. She speaks of the qualities of her mind, and says she observed nothing to lead her to conclude that the testatrix had become irrational, but the contrary. Other witnesses give testimony to the same effect.

It is alleged, on the part of the caveatrix, that the testatrix did not know what property she had, and this is urged as strong evidence of want of capacity. The allegation is that she supposed her property amounted only to \$900, whereas, in fact, she had \$5,000, and the interest of \$10,000 for her life. It is very probable that, in speaking on the subject, she spoke of her annual income, which

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was about \$900, as her property. But it is quite evident from her will that she knew that she had much more than \$900, for she gives nearly \$3,000, in small legacies, to her grandchildren and daughters-in-law, and then gives the residue of her estate—presumably, under the circumstances, the greater part—to her eight children. Moreover, she knew who had charge of her property, and if she was, indeed, ignorant of so important a fact as the amount of her property, Mr. Vliet, who knew all about it, could not have failed to discover it. The will is not only a natural one, but it evinces great care on the part of the testatrix for those who had a right to her estate or to remembrance in her will. As before stated, she mentions a score of her grandchildren, and did not forget the family of the caveatrix (who is a granddaughter), for she gave a legacy to her sister. On a consideration of all the evidence, it seems to me quite clear that the testatrix, at the time of making the will in question, was possessed of testamentary capacity, and that it is her true last will and testament.

The decree of the orphans court will be affirmed, with costs of appeal to be paid by the appellant.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
MARCH TERM, 1881.

GEORGE W. SMITH, appellant,

v.

THE MAYOR AND COMMON COUNCIL OF NEWARK, respondent.

1. The supplement to the charter of the city of Newark, framed April 15th, 1868 (*P. L. of 1868 p. 1002*), construed, and held to be constitutional.

2. The burden of showing error is on the appellant, and in a case of doubtful statutory construction, the court will not reverse.

On appeal from a decree of the chancellor, reported in *Smith v. Newark*, 1 *Stew. Eq.* 5.

Mr. F. W. Stevens, for the appellant.

The bill is filed to remove the cloud from the title to the lands of the complainant, arising from the assessment for grading, curbing, guttering, paving and flagging North Broad street, now Belleville avenue.

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The question to be considered is a narrow one, and, stated in very general terms, is this :

Do the facts stated on the record bring the case within the ruling of this court in *Bogert v. City of Elizabeth*, 12 C. E. 568, where the bill to set aside an unconstitutional assessment was sustained? or do they bring it within the ruling of this court in *Jersey City v. Lembeck*, 4 Stew. Eq. 255, where the bill to set aside an assessment which was illegal, but not unconstitutional, was dismissed?

I. The provisions of the statutes under which the assessment was made are unconstitutional. *Doyle v. Newark*, 1 Vr. 303; *P. L. of 1868 p. 1002*; *State, Doyle, pros. v. Newark*, 5 Vr. 237; 3 C. E. Gr. 527; 8 Vr. 424; 12 C. E. Gr. 569; *Graham v. Paterson*, 8 Vr. 381; *Passaic v. State, Del. Lack. & West. R. R. pros.* 8 Vr. 539.

II. A sale of the property under an assessment which was clearly illegal, having been made, and the city of Newark having become the purchaser for a term of fifty years, and having taken a certificate of sale therefor, such certificate of sale, with an assertion of title on the part of the city, constitutes a cloud removable by a court of equity. *Jersey City v. Lembeck*, 4 Stew. Eq. 255.

While the court of chancery has never exercised a supervisory power over the acts of municipal bodies, it has always assumed jurisdiction over deeds purporting to convey lands, the existence of which, in an uncanceled state, has a tendency to throw a cloud over the title. *Story's Eq. Jur.* § 700.

It is true the legislature has extended the beneficial remedy of *certiorari* to the case of a deed (*Rev. 1045 § 15*), but this seems to have been done mainly in aid of the action of ejectment (*State, Graham pros. v. Paterson*, 8 Vr. 384), and the power of chancery to afford its remedy is not in any wise interfered with. The sale of lands for taxes or assessments is the execution of a naked power (*State, Baxter, pros. v. Jersey City*, 7 Vr. 191), and if a deed has been given in execution of this power, and a title set up thereunder, which is really no title, why should not chancery have the same power in this case that it admittedly has in all other cases?

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Mr. Henry Young, for respondent.

This court, sitting as a court of equity, is asked to assume the prerogative of the supreme court, which has always hitherto effectively controlled the action of inferior tribunals exercising particular legal functions.

No doubt can exist that the complainant's *remedy at law* is entirely efficacious, unless he has forfeited it by his laches.

His failure to avail himself promptly of his legal remedy, gives him no right to relief here. *Lewis v. Elizabeth*, 10 C. E. Gr. 298.

His remedy at law would be even more beneficial than that which he now seeks. *Lembeck v. Jersey City*, 4 Stew. Eq. 255.

The remedy at law, then, being adequate, the complainant can claim no relief in this court.

A court of equity will not undertake to set aside titles founded on tax or assessment sales, simply because the assessments have been illegally made. *Morris Canal and Banking Co. v. Newark*, 1 Beas. 252; *Holmes v. Jersey City*, 1 Beas. 310; *Liebstein v. Newark*, 9 C. E. Gr. 206; *Dusenbury v. Newark*, 10 C. E. Gr. 287; *Bogert v. Elizabeth*, 10 C. E. Gr. 427; *Lewis v. Elizabeth*, 10 C. E. Gr. 289; *Lembeck v. Jersey City*, 4 Stew. Eq. 255.

But the complainant invokes the aid of the statute of March 2d, 1870 (*P. L. p. 20*), entitled "An act to compel the determination of claims to real estate, and to quiet title to the same."

Several objections exist to the application of this statute to this suit.

1. The statute requires (sec. 2) that notice shall be given to the defendant with his subpoena, describing the land with precision, stating the object of the suit, and that if defendant claims any title or interest or encumbrance on said lands, he shall answer said bill, but not otherwise.

No such notice was given in this case.

2. The statute authorizes the bringing of suit in equity to settle title to lands only when the person whose title is disputed is (a) in *peaceable possession of said lands*, and (b) *when no suit is pending to test the validity of said title*.

These facts are jurisdictional, and *both* must exist to enable

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the court to entertain jurisdiction. The complainant seeking the aid of the statute must bring himself within its provisions.

The bill states neither of these facts.

But (3) a more serious objection exists to the maintenance of complainant's suit. This act of 1870, if at all applicable to such a state of affairs as that in this suit, proposes nothing less than that the constitutional powers and jurisdiction of the supreme court of the state should be curtailed by legislative enactment, and transferred to a court of equity. The inability of the legislature to give such force and effect to this law has been recently determined in this court. *Lembeck v. Jersey City*, 4 Stew. Eq. 255.

No provision exists in any law of this state for re-assessment when assessments are vacated in a court of equity.

Courts properly refuse to grant relief where no provision is made for re-assessment. *State, Wilkinson pros. v. Trenton*, 7 Vr. 499.

I submit (1) that the act of 1868 is constitutional. *Cooley on Const. Lim.* 181-184.

Such an enactment was held valid by this court in *Village of Passaic v. State*, 8 Vr. 538.

But (2) it is contended that the complainant should prevail, because the report fails to show affirmatively that the assessment was limited to the actual benefit.

The act relative to *certiorari* (*P. L. of 1871 p. 534*) provides that the courts of law shall have full power to determine *disputed questions of fact* as well as law, with reference to taxes and assessments. *Morris and Essex R. R. Co. v. Jersey City*, 7 Vr. 56; *Baxter v. Jersey City*, 7 Vr. 188; *Graham v. Paterson*, 8 Vr. 384.

A suggestion is made in the bill that the complainant should be relieved because this assessment was made after he purchased the property, and without knowledge that it was to be made.

But the principle of law is well established that if the original assessment for a local improvement be insufficient, the legislature may constitutionally authorize a re-assessment, and make it operate upon all the property benefited, *that is, upon all that was originally liable to contribute*, and such a law is valid as against a party purchasing intermediate the assessment and re-assessment.

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on *Mun. Corp.* § 652, and note ; *Cooley on Taxation* 233 ;
v. *Newark*, 5 *Vr.* 237.

the opinion of the court was delivered by

ASLEY, C. J.

The object of the bill in this case is to remove a cloud from the title of the complainant, who is the appellant here, to certain lands situated in the city of Newark. The proceeding is founded on a statute entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same" (*Rev. 1189*). The lands in question had been sold by the city of Newark, in satisfaction of an assessment levied upon them for a portion of the damages and expenses consequent on regulating, grading, paving, curbing and flagging of the street on which they fronted. The city had become the purchaser at this sale.

The ground laid for relief against this course of law is that the law that was enforced by that sale was imposed by virtue of an act of the legislature which is unconstitutional. If that contention is well founded, the bill has no legal or equitable foundation.

The inquiry thus raised touches the proper construction of the charter of the city of Newark, approved April 1868. (*P. L. of 1868 p. 1002*). This law is remedial of the defects in the charter, which it is auxiliary, in respect to the mode of assessing costs and charges arising in the grading, paving, &c., of streets in this city. That subject was regulated by section one and nine of the charter; and as such regulation conferred a direction that such costs and charges should be distributed, under "a just and equitable assessment upon the owners of lots and real estate on the line of said street," by the city of Newark, the unconstitutionality of it was manifest, as it provided no standard for the measuring of its imposition, other than the discretion of the officer, nor did it attempt to restrict the land-owner's quota to the special benefit imparted to his land by the improvement. This being the obvious and admitted imperfection of the system originally established, it is further insisted that the remedial act just referred to does not so remodel the scheme as to make it comport with the constitutional requirement. It

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thus becomes necessary to collate this supplement with the charter.

The supplement recites that the city had undertaken and performed, at considerable cost, certain works and improvements in several specified streets, some of which had been opened and others graded, and that assessments therefor had been made, but, on account of certain informalities and defects in the proceedings, the city was embarrassed in collecting the costs and expenses, and therefore it was enacted as follows :

“That it shall be lawful for the said common council, in the case of each of the aforesaid works or improvements, respectively, to appoint five disinterested freeholders of said city, to make assessment of the whole costs, damages and expenses of the works or improvement in respect to which they may be appointed, upon the owners of the land and real estate benefited, or intended to be benefited, according to the principles prescribed for similar cases in the act to which this is a supplement ; * * * and it shall also be lawful for the said commissioners, in case they deem it proper and equitable, that any portion of the whole costs, damages and expenses of either of said works or improvements should be borne by the city at large, to so estimate and declare in their report, and thereupon they shall assess the balance of the whole amount of such costs, damages and expenses upon the owners of the lands and real estate benefited, or intended to be benefited, as hereinbefore is directed.”

Upon reading this section, it becomes at once apparent that what it does, in express terms, is this : to declare that certain commissioners may be appointed to assess these costs and expenses on the lands benefited ; but the mode of doing that is not defined, and for such mode, it refers to the charter, for it says that such assessment shall be made “according to the principles prescribed *for similar cases* in the act to which this is a supplement.” The meaning of this reference is the point of the present inquiry. What class of cases are the “similar cases” here indicated ? The reference must point to one of the two classes of proceedings provided in the charter, the one being that which pertains to the opening of streets, and the other that which pertains to the regulating and grading of streets. The former of these methods of assessment is defined in section one hundred and five of the charter of 1857 (*P. L. of 1857 p. 166*), and which is admitted to be constitutional ; the latter, by section one hundred and nine, and which prescribes a mode of action which, as has been already said, is uncon-

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stitutional. The decision, therefore, turns on the question whether the proceeding authorized by this supplement of 1868 is to be patterned after the method prescribed in section one hundred and five, or after that directed in section one hundred and nine. We have seen the relative words are those contained in the direction to make the assessment "according to the principles prescribed for similar cases in the act to which this is a supplement." On the side of the appellant, it is contended that these expressions denote similarity in the work or improvement; that is to say, when the commissioners by force of this supplement, have in hand a re-assessment which relates to the grading of a street, the case similar to that in the charter, is the work of grading provided for in section one hundred and nine, and so *vice versa*. The term "similar cases" imports similar improvements. It is manifest that there is considerable force in this view, but it is also manifest that there are other considerations having an adverse aspect. The proceeding set on foot by the supplement is a proceeding to be conducted by commissioners, and if we look for a "similar case" of that kind we will not find it in section one hundred and nine, for by force of that provision the city surveyor is to apportion the expenses, and not commissioners. We must resort to section one hundred and six, if we would find a similitude in this particular.

And so we come to the same result if we regard the class of persons who are to be assessed, for, by the supplement, and by section one hundred and six, the expenses are to be apportioned on the entire class who are benefited, while, according to section one hundred and nine, they are to be imposed only on lands bordering on the streets. In addition to this, there is a slight indication, having the same tendency, in section two of this supplement, from the fact that it directs the enforcement of the assessments authorized by it to be conducted after the manner of enforcing the assessments imposed under section one hundred and six. But it is not necessary to pursue this discussion further, for I think enough has been said to show that the expression in question is plainly ambiguous, and that it cannot be freed from uncertainty by any train of reasoning. The truth is, that these laws which this court is now called upon to construe,

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like very much of the legislation that relates to our municipal governments, are so crudely put together, and are made up of such vague phrases, that it is impossible to avoid the unsatisfactory feeling that any judicial interpretation of them cannot be attended with any higher decree of certitude than that which an intelligent conjecture carries with it. In the court below this clause was interpreted in a sense which will uphold these proceedings, and it is the duty of this court to lean strongly towards that same result. The burthen of showing error in the decree under review is on the appellant; to raise a doubt in that respect is not enough; and taking the argument of the counsel of the appellant at its best, it does not seem to me to do more than that. The consequence is, the decree should be affirmed.

Decree unanimously affirmed.

FRANCIS M. HOAG, appellant,

v.

EDWARD SAYRE et al., respondents.

1. Where there are three encumbrances on the same property, the first of which is entitled to priority over the second, but is subordinate to the third, which is subordinate to the second, they will be marshaled as follows: the third, if it be for as large a sum or a larger sum than the first, will be paid to the extent of the sum secured by the first; then the second encumbrance will be paid in full if the property is sufficient, and then the residue to the third, if there be a residue; and then the first incumbrance will come in. The principle of *Clement v. Kaighn*, 2 McCart. 48, approved and developed.

2. A took a chattel mortgage for \$2,150 and failed to record it; B, with knowledge of the first mortgage, took a second one for \$1,160; C obtained a judgment for \$3,000 on the same day with the second mortgage, and made a levy.—*Held*, that C had the first lien to the extent of \$2,150, the amount of the first mortgage; then that the residue of the judgment and the second mortgage should be paid *pari passu*, and, lastly, that the first mortgage should come in for payment.

On appeal from a decree advised by the vice-chancellor, and reported in *Sayre v. Hewes*, 5 Stew. Eq. 652.

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On the 3d of December, 1877, the appellant, Hoag, obtained a chattel mortgage on the goods in question. This mortgage was not recorded in the proper county; it was to secure \$2,150. On the 14th of February, 1878, Frederick Fisher, having knowledge of the prior mortgage, took a second mortgage on the same property to secure \$1,160. Edward Sayre holds a judgment by confession against the mortgagor for \$6,000 debt and \$4 costs, which was entered on the 27th of February, 1878. Execution on this judgment was duly taken out and levied.

Messrs. Field, for appellant.

On January 11th, A. D. 1877, Margaret V. Hewes, then residing in Fulton street in the city of Newark, executed a chattel mortgage, *Exhibit D 1* for appellant, Hoag, on certain chattels then being in a building in the city of Newark, to Francis M. Hoag, and this mortgage was, on the 12th day of January, A. D. 1877, filed in the office of the register of the county of Essex. This mortgage was given to secure indebtedness, of which *Exhibit D 3* for Hoag is an itemized bill. December 3d, A. D. 1877, Margaret V. Hewes executed a second mortgage to Francis M. Hoag, to secure the whole of the above indebtedness, and some additional indebtedness, of which *Exhibit D 4* is an itemized bill. At the time of taking the second mortgage, the first one was not given up or canceled, but is still in the possession of Mr. Hoag.

On February 14th, 1878, Margaret V. Hewes executed a third mortgage on the same chattels to Frederick Fisher, which was filed March 2d, A. D. 1878, in the office of the register of the county of Hudson.

The fourth mortgage was executed by Mrs. Hewes to Edward Sayre on the same chattels, which was also filed in the office of the register of Hudson county on the day of its date.

On February 27th, A. D. 1878, Edward Sayre, trustee &c., recovered a judgment by confession against Mrs. Hewes on bond and warrant of attorney, in the Essex circuit court, for \$14,000.

On March 2d, A. D. 1878, Albert H. Hewes recovered a

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judgment by confession on bond and warrant of attorney, in the same court, for \$6,000.

Albert H. Hewes, immediately after its recovery, assigned judgment to Edward Sayre. No consideration was paid for assignment. Edward Sayre is the son-in-law, and Albert Hewes is the son, of Margaret V. Hewes.

Edward Sayre and Frederick Fisher knew, when they received the mortgages made to them, that Mrs. Margaret Hewes had previously executed the mortgages to Mr. Hoag.

They are both subsequent mortgagees with notice of the antecedent mortgages.

The question presented is, which of these mortgages and judgments have priority.

I. What is the effect of a recital in a chattel mortgage when the instrument states her residence to be in a certain place?

It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled another, who acted upon it in good faith, and in the exercise of reasonable care and diligence under all the circumstances, that is enough. 30 N. Y. 226.

They are concluded by the recitals and admissions in the mortgage. *Hudson v. Winslow*, 6 Vr. 437; *State Bank of Elizabeth v. Chetwood*, 3 Hal. 1.

A court of equity will never lend its active aid to a party who, by artful silence and superior knowledge, has gained an unfair advantage over another who stands by and acquiesces in the recital. 6 C. E. Gr. 283; 1 Zab. 395, 403; Fonb. Eq. 124, 164; 3 Stock. 176; 1 Gr. Ch. 422.

A court of equity will not aid one against another who has been misled, to his prejudice, by the conduct of the former. 8 C. E. Gr. 477; 1 Beas. 323.

Where any one has done an act or made a statement which would be fraud on his part to controvert, and such act or statement has so influenced another that he has acted upon it, the party making it will be estopped from the power of retraction. 2 Stock. 510.

A party cannot question a conveyance as fraudulent against

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himself as a creditor who advised and counseled its execution. *1 Stock. 160.*

Recitals in a deed are binding on the parties and privies to it, and those claiming under them. *West v. Pine, 4 Wash. C. C. 691.*

Whilst this question of registration depends in a great measure upon state legislation, the *lex loci contractus* must govern. The various state courts have assented to and affirmed this doctrine; and if it be applicable to citizens of different states, is it any less so to citizens of different counties of the same state? The courts do not require a chattel mortgage to be recorded in any county in which the property may be taken, or the mortgagor may remove to, nor do the laws of any state of this Union require it. One registration in conformity with the statute is sufficient as to individuals. *Herman on Chattel Mort. 175.*

II. The taking of the second mortgage by the appellant, Hoag, on December 3d, A. D. 1877, did not extinguish the first. *Gregory v. Thomas, 20 Wend. 17; Hill v. Beebe, 3 Kern. 557.*

The mere act of taking a new security from the same party, and upon the same property, does not merge or extinguish a prior one, where both are of the same quality and degree. The debt was not paid, and until that was done, all collateral securities must stand. *Butler v. Miller, 1 Comst. 500; Gregory v. Thomas, 20 Wend. 17.*

A subsequent security for the same debt, or for a debt of equal degree with a former, will not, by operation of law, extinguish it. *Manhood v. Crick, Cro. Eliz. 716; Norwood v. Griffin, Cro. Eliz. 727; Maynard v. Crick, Cro. Car. 86; Enos's Case, Lit. 58; Preston v. Preston, Cro. Eliz. 817; Hill v. Beebe, 3 Kern. 556.*

The lien continues until the debt is paid or extinguished, or the lien itself is destroyed by agreement between the parties. Until the debt is paid, all collateral securities stand; the security of a mortgage is in no way impaired. *Herman on Chattel Mort. 129; Butler v. Miller, 1 N. Y. 500; Brinkerhoff v. Lansing, 4 Johns. Ch. 65; Gregory v. Thomas, 20 Wend. 17; Williams v. Starr, 5 Wis. 534; Chapman v. Jenkins, 31 Barb.*

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164; *Bank &c., v. Finch*, 8 Barb. Ch. 293; *Robinson v. Urquhart*, 1 Beas. 515; *Higgins's Case*, 6 Rep. 45; 8 Johns. 54; 15 Johns. 555.

Where a mortgage is given to secure a certain debt it will be a valid security for that purpose, whatever form that debt may assume if it can be traced. *Paterson v. Johnson*, 7 Ohio St. 225.

A subsequent security for a debt of equal degree with a former, will not, by operation of law, extinguish it. *Butler v. Miller*, 1 N. Y. 500; *Gregory v. Thomas*, 20 Wend. 17; *Higgins's Case*, 6 Rep. 45; *Rawden v. Turten*, Browne, 74; *Phelps v. Johnson*, 8 Johns. 54; *Preston v. Preston*, Cro. Eliz. 817; *Mumford v. Stocker*, 1 Conn. 78; *Cowell v. Lamb*, 20 Johns. 407; *Enos's Case*, Litt. 58; *Day v. Leal*, 14 Johns. 404; *Hamilton v. Cullender*, 1 Dall. 420; *Andrews v. Smith*, 9 Wend. 53; *Hill v. Beebe*, 13 N. Y. 556.

So that the taking of a second mortgage for the same debt will not relinquish the first without an express release of the first, and this even where the note and mortgage given in renewal is for a larger amount than the original. *Burnhisel v. Furman*, 22 Wall. 170; *Boyd v. Beck*, 20 Ala. 703; *Packard v. Kingman*, 11 Iowa 219; *Hill v. Beebe*, 13 N. Y. 556; *Hutchinson v. Swartsweller*, 4 Stew. Eq. 207, and the cases therein cited.

III. As between the chattel mortgages of Francis M. Hoag, Frederick Fisher and Edward Sayre, it is not material where Hoag filed his chattel mortgage. *Meech v. Patchin*, 14 N. Y. 71; *National Bank of the Metropolis v. Sprague*, 6 C. E. Gr. 530; *De Courcey v. Collins*, 6 C. E. Gr. 360.

IV. Whether the preferences sought by Albert H. Hewes and Edward Sayre, in obtaining the judgments, are not fraudulent as against the defendant Francis M. Hoag.

Albert H. Hewes is the son, and Edward Sayre is the son-in-law of the defendant Margaret V. Hewes.

Whatever puts a party upon inquiry amounts, in judgment of law, to notice, providing the inquiry becomes a duty, as in the case of purchaser and creditor, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence. *Troup v. Hurlbut*, 10 Barb. 354; 4 Kent's Com. 179.

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Notice to a subsequent attaching creditor of a valid mortgage, not recorded, is equivalent to a record. *Tucker v. Tilton*, 55 N. H. 223; *Gooding v. Riley*, 50 N. H. 400; *Patton v. Moore*, 32 N. H. 382.

Knowledge is regarded as equivalent to notice of the highest degree. 1 *Lead. Cas. in Eq.* 148; *Crocker v. Crocker*, 31 N. Y. 507; *Wooster v. Sherwood*, 25 N. Y. 278.

If there be an existing mortgage at the time the judgment is rendered, that judgment will bind only the equity of redemption, whether the mortgage be recorded or not. *Jones on Mort.* § 460; *Knell v. Green Street Building Ass.*, 34 Md. 67; *Hackett v. Callender*, 32 Vt. 97.

If a creditor have actual notice of a prior unrecorded mortgage at the time of obtaining his judgment lien, he will hold his lien subject to such mortgage. *Jones on Mort.* § 461.

V. Disregard of notice amounting to fraud. *Curtis v. Mundy*, 3 Metc. 405.

Notice, if sufficient to put him upon inquiry leading to the truth, will, in general, be regarded as good notice of the ultimate fact to be established. *Green v. Slayer*, 4 Johns. Ch. 38; *McDaniel v. Flower Brook Manufacturing Co.*, 22 Vt. 274; *Maybin v. Kirby*, 4 Rich. Eq. 105; *Raritan Water Power Co. v. Veghte*, 6 C. E. Gr. 463; *Hoy v. Bramhall*, 4 C. E. Gr. 563; *Danforth v. Dart*, 4 Duer 101; *Sterry v. Arden*, 1 Johns. Ch. 261; *Pendleton v. Fay*, 2 Paige 202; *Tuttle v. Jackson*, 6 Wend. 213; *Hoy v. Bramhall*, 4 C. E. Gr. 572; 4 Kent 179; *Jones v. Smith*, 1 Hare 43.

It is bad faith for one to attempt the circumvention of the true owner of the property by endeavoring to anticipate him in gaining the advantage to be derived from an acquisition of the legal title. *Kennedy v. Daly*, 1 Sch. & Lef. 355; *Coble v. Nonemaker*, 78 Pa. St. 501; *Kepler v. Davis*, 80 Pa. St. 153.

VI. To what extent is the complainant, Edward Sayre, a creditor?

VII. Mortgages to indemnify sureties. Rights of sureties and of creditors.

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If the indemnity is against a contingent liability, there can be no substitution until the liability has become absolute. *Osborn v. Noble*, 46 Miss. 449; *Hall v. Cushman*, 16 N. H. 462; *Bank of Virginia v. Borseau*, 12 Leigh 370.

Thus a mortgage made to an endorser of a note for the maker's accommodation, to secure him against liability, is not accessory to the principal obligation, but simply a personal indemnity, depending upon the payment of the note by the endorser. Until the endorser pays the money on his endorsement, he can maintain no action for money paid. *Miller v. Henry*, 3 Pa. St. 380; *Gardener v. Cleveland*, 9 Pick. 337; *Shepard v. Shepard*, 6 Conn. 37.

VIII. Is a chattel mortgage valid as against a creditor of the mortgagee, unless the same is filed pursuant to the statute? *Astor v. Wells*, 4 Wheat. 466; *Wade on Notice* § 228.

Whoever is a purchaser at an execution sale, whether he be a creditor or not, is charged with constructive notice of all instruments affecting the title, executed and delivered by the debtor prior to the judgment, and subsequently recorded prior to the sale. *Jackson v. Post*, 15 Wend. 588; *Williamson v. Brown*, 1 N. Y. 354; *Whitehead v. Jordan*, 1 You. & Coll. 313; *Mumgrove v. Benson*, 5 Oregon 313; *Wade on Notice* § 231.

Unregistered deeds are good against creditors, with sufficient notice to put them upon inquiry. *Dixon v. Doe*, 1 Sm. & Marsh. 70; *Priest v. Roll*, 1 Pick. 164.

The one who seeks to take advantage of an unregistered instrument, of the existence of which he has been fully informed, will be allowed to enjoy no special advantages, although the failure to record the mortgage was fraudulent as to others. *Pike v. Armstead*, 1 Dev. Eq. 110.

The omission to renew it did not impair its force as against a person standing in the situation of the complainant. *Sanger v. Eastwood*, 19 Wend. 515.

Messrs. Coult & Howell, for respondents.

I. Margaret V. Hewes, the mortgagor, at the time of

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giving the chattel mortgage to Hoag, was a resident of Hudson county, and not of Essex county, where the chattels mortgaged were located.

Her statement that she was at that time a resident of Newark, in Essex county, if any such statement was made, could only affect the relations of the parties to the mortgage, and could not affect the rights of the complainant, a judgment creditor.

II. The statute provides that chattel mortgages must be filed in the county where the mortgagor resides, not where the chattels are located, in all cases where the mortgagor resides in this state.

If the mortgagor does not reside in this state, the mortgage must be filed in the county where the chattels are located.

III. The statute providing for filing chattel mortgages, makes such filing constructive notice only to subsequent *purchasers* and *mortgagees*; if they take, respectively, title to, or lien on, the chattels mortgaged after such filing, they are not purchasers or mortgagees in good faith—they are charged with notice.

But the statute does not affect or operate on the rights of judgment creditors; they are not charged with notice by the filing of the mortgage.

The words of the statute are that chattel mortgages “shall be absolutely void *as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith*, unless the mortgage, or a true copy thereof, shall be filed as directed, &c.”

It makes two classes of persons as against whom the mortgage shall be void—

(1) The creditors of the mortgagor, who need not be such in good faith, in the sense used in the act.

(2) Subsequent purchasers and mortgagees *in good faith*—who alone, of all the world, are charged with notice by the filing.

IV. That justice could not be done to the complainant without putting him, in the first position, among the parties to this suit, and allowing him to be paid first out of the fund in the receiver's hands.

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The opinion of the court was delivered by

BEASLEY, C. J.

I agree with the vice-chancellor in his settlement of the disputed facts in this case, but it seems to me that an error has crept into the decree with respect to the marshaling of the encumbrances. These liens are of this character: the mortgage first in date is held by the appellant, Hoag; then comes a mortgage held by Frederick Fisher, one of the defendants, and lastly is the judgment of the defendant Sayre. This first mortgage was not recorded in the proper county, and therefore is subordinate to the judgment, but it is paramount to the second mortgage, which was taken with knowledge of the existence of this first lien. In this state of things, the decree places the judgment and the first mortgage, by way of preference, before the second mortgage. This, as it seems to me, is unjust and inadmissible.

Upon what possible principle is the result in this case to be justified? Fisher, when he took his mortgage, knew that there was an antecedent mortgage on the same property, securing the sum of \$2,150, with interest. He had his own mortgage duly recorded, so that it became incontestably the second legal lien; in this position of affairs this judgment is entered, and he at once finds himself, without any fault on his part, degraded from the position of a second encumbrancer to that of a third encumbrancer, and instead of the mortgaged property being subject to a claim prior to his own of but \$2,150, it is subject to paramount claims which amount to the sum of \$5,150. If such a principle be correct, it does not appear that any person, under any circumstances, can take a second or other subordinate mortgage upon property, without putting his interests in the utmost jeopardy. Under the prevalence of such a rule of law, a subsequent encumbrancer would be obliged to see that the *status* of the primary encumbrance was, in all respects, unexceptionable, under penalty, if a flaw should be undetected, of having his lien superseded by every judgment that might be entered at a later date. Such a rule would be as inexpedient as it would be unjust.

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I cannot but think that any one who will look carefully into the subject will perceive that no rule applicable to such a juncture as this can be admissible that is not founded on the theory of leaving the second mortgagee in the position originally acquired by him, without respect to the neglects or shortcomings of the holder of the previous mortgage or the subsequent judgments of creditors. Viewed in this aspect, this would be the result: the judgment creditor would, in the marshaling of these liens, take priority over the first mortgage; as between the judgment and that mortgage, the former must be first paid. But with respect to the second mortgage, the judgment creditor, as such, has no claim to stand first, his only claim in that regard being his right to stand in the shoes of the first mortgagee, and assert all the privileges incident to that position. But he can exact nothing further than such privileges; he can legally say that he has the paramount lien on the property to the extent of the sum secured by the first mortgage; but he cannot legally say that, with respect to the second mortgagee, he has any paramount lien beyond this. No additional burthen can be put upon the land to the detriment of the second mortgagee. If the judgment be for a sum greater than that secured by the first mortgage, then, by right of representation, such judgment will constitute the first lien to the full extent, and no further, of the first mortgage; if it be for a less sum than the first mortgage, it will take precedence and consume the first mortgage to that extent only. It will be observed that by these adjustments the priority of the first mortgage, with regard to the second mortgage, will be exhausted, either partially or wholly, so that, to the extent of such exhaustion, it will be postponed to the second mortgage.

The doctrine thus propounded is but the development of the principle maintained and acted on in *Clement v. Kaighn*, 2 McCart. 48. In that case there was a judgment without an execution; then a mortgage, and then judgments on which executions had been taken out. These latter judgments were entitled to precedence over the first, but were subordinate to the mortgage. Chancellor Green decided that the first judgment on the mort-

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ged premises, by reason of the failure to sue out execution on it, should be postponed to the encumbrance of the junior judgments, and, as an inevitable consequence, that it should be postponed to the mortgage which was prior to the junior judgments, and whose priority was not to be affected by any laches of the holder of such prior judgment.

In my opinion, the decree in this case should be modified so as to direct the payment of these encumbrances in this order, *viz.* first, the judgment of Sayre to the amount secured by the first mortgage; second, the payment of the residue of such judgment and the second mortgage, *pari passu*, as they were concurrent liens, being entered on the same day; third, the payment of the first mortgage.

DIXON, J. dissenting.

I agree with the conclusions which the vice-chancellor has reached upon the facts.

But I dissent from the legal rule by which he fixes the order of priority, for I do not think it necessary to advance the complainant Sayre to the front against everybody, in order to give him the full benefit of his superiority to Hoag.

Nor do I assent to the rule laid down in the opinion just read since I see no reason for regarding the complainant as substitute in the stead and rights of Hoag as against Fisher, merely because Hoag failed to comply with the registry laws. The effect of non-compliance with those laws is declared by themselves to be, not that the rights of him in default shall be transferred to the subsequent encumbrancers, but that his claim shall be postponed as to them.

Therefore, if there be three encumbrancers, A, B and C in that order of time, and A's lien be prior to B's, and B's to C's, for A's omission to properly register his lien, it is void as to C, then the fund should be disposed of as follows:

1. Deduct from the *whole fund* the amount of B's lien, and apply the balance to pay C. This gives C just what he would have if A had no existence.

2. Deduct from the *whole fund* the amount of A's

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apply the balance to pay B. This gives B what he is entitled to.

3. The balance remaining after these payments are made to B and C is to be applied to A's lien.

To illustrate: Suppose the fund to be \$5,000; A's lien to be \$3,000; B's lien to be \$4,000, and C's lien to be \$2,000. Then, C receives \$5,000, less \$4,000=\$1,000; B receives \$5,000, less \$3,000=\$2,000; A receives \$5,000, less (\$1,000+\$2,000),=\$2,000.

Or suppose the fund to be \$5,000, and each of these encumbrances to be \$5,000; then it will appear that A, the first in time, will take it all; since, except for the registry laws, he would clearly be entitled to it, and the registry laws simply prevent his taking anything by which C's security may be lessened. But C's security was nothing at the beginning, for B's prior lien covered the whole fund; and C, therefore, has no right by which A's claim can be impaired.

Where B's and C's claims are concurrent in time and lien, but A is prior to B, and void as to C (as in the present case), the distribution should be as follows:

1. Divide the *whole fund* in the proportion of B's and C's claims, and give to C his proportion. Thus is A ignored in fixing C's rights.

2. Deduct from the *whole fund* the amount of A's lien, and apply the balance to B's claim.

3. The balance remaining after both payments goes to A.

By applying these rules to the case before us, it will be seen that, in my judgment, Fisher alone is injured by the decree below; but as he is not a party to this appeal, the decree cannot be changed here for his sake, and therefore, I think, should be affirmed.

For affirmance—DIXON—1.

For reversal—BEASLEY, C. J., DEPUE, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, DODD GREEN—12.

Van Orden v. Budd.

JOHN A. VAN ORDEN, appellant,

v.

NELSON L. BUDD, respondent.

Where a person took an absolute conveyance, but which was, in point of fact, a mortgage, and sold the premises as his own, repudiating the interest of the grantor, and took a mortgage for part of the consideration money—*Held*, that it was not inequitable to charge him, in his accounts with the grantor, with the amount of the money secured by the mortgage taken by him, as so much cash in hand.

On appeal from a decree advised by the vice-chancellor, whose opinion is reported in *Budd v. Van Orden*, 6 *Stew. Eq.* 143.

Mr. Theo. Little, for appellant.

Not disputing but that the deed, though absolute on its face, may be shown by parol to have been in fact intended to be only a mortgage, I submit:

I. That to so control and qualify the plain and absolute terms of a deed, the evidence must be clear, unequivocal and convincing, and such as to show that the grantee's claim that the transaction was originally a purchase, is inconsistent with the subsequent conduct of both parties, and such as, if sustained, will defraud the grantor of some valuable right.

The proof must go further than merely to show that the grantee agreed that the deed should not be held and used as an absolute conveyance. If the grantor executed it, knowing, at the time, it did not express the true agreement, he cannot be relieved from the consequences of his own act. *Lord Irnham v. Child*, 2 *Bro. C. C.* 93; *Selden v. Myers*, 20 *How.* 506; 2 *Lead. Cases in Eq.* 944, 1011; *Clark v. Condit*, 3 *C. E. Gr.* 359; *Decamp v. Crane*, 4 *C. E. Gr.* 169; *Sweet v. Parker*, 7 *C. E. Gr.* 453.

But the one element or characteristic of a mortgage, and which distinguishes it from a deed, is the agreement for a defeasance. This is of the very essence of a mortgage, and unless it exists in some form, by agreement between the parties, the instrument is

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not a mortgage. 1 *Jones on Mort.* §§ 16, 241, 256, 263; 2 *Cruise Digest*, title x, ch. 1 § 11; 1 *Wash. Real Prop.* ch. 16 § 1; *Montgomery v. Bruere*, 1 *South.* 269.

Such agreement for defeasance must also have been made at the time the deed was executed. The grantor cannot speculate upon the chances for depreciation or appreciation of the property. 1 *Jones on Mort.* §§ 256, 263; *Kearney v. Macomb*, 1 *C. E. Gr.* 194; *Youle v. Richards*, *Sax.* 537; *Crane v. Bonnell*, 1 *Gr. Ch.* 265; *Clark v. Condit*, 3 *C. E. Gr.* 359; *Phillips v. Hulsizer*, 5 *C. E. Gr.* 308; *Judge v. Reese*, 9 *C. E. Gr.* 390; *Melick v. Creamer*, 10 *C. E. Gr.* 429.

Indeed, so essential is this feature of defeasance or right of redemption, that it is the one ground on which the jurisdiction of the court, in cases of this kind, is declared to be founded. 2 *Story Eq. Jur.* §§ 1018, 1019; 4 *Kent Com.* 143.

II. But the case does go further, and shows most conclusively that the one element which characterizes a mortgage and distinguishes it from an absolute conveyance, is entirely absent—that is, the right of redemption or defeasance.

No resumption or reconveyance was ever contemplated, and if not, there could have been no mortgage, for that is defined to be “an estate defeasible by the performance of a condition subsequent.” 1 *Wash. Real Property* ch. 16 § 1.

III. The evidence is not only inconsistent with the idea that the deed was intended as a mortgage, but is entirely consistent with the defendant's claim that it was intended as an absolute sale to him.

(a) The form of the deed is such as it would have been if a sale had been made.

(b) The condition of the estate and of the complainant were such as to make such sale desirable.

(c) Both parties subsequently declared it to be a sale, and not merely a mortgage.

(d) The consideration of \$900, expressed in the deed, and the mode in which it was paid, and complainant's receiving and holding Mr. Van Orden's note for \$400, clearly indicate a pur-

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chase. The other heirs or devisees sold their interest for about \$1000 per share, and some for even a less amount.

IV. If, however, while it appears from the evidence the deed was made as the parties intended it should be, the claim shall be set up by the complainant that there was an agreement on the part of the defendant to hold it in trust for the complainant, or to receive and hold his share of the estate when it was settled, in trust, to pay the \$500 advanced to him, and the remainder, after payment of his notes, in trust for him, it is such an agreement as cannot be sustained. It is clearly within the statute of frauds. *Hutchinson v. Tindal*, 2 Gr. Ch. 362; *Eaton v. Eaton*, 6 Vr. 292; *Baldwin v. Campfield*, 4 Hal. Ch. 894, 900, 904; *Whyte v. Arthur*, 2 C. E. Gr. 523; *Servis v. Nelson*, 1 McCart. 100; *Hogan v. Jaques*, 4 C. E. Gr. 126; *Brown ads. Combs*, 5 Dutch. 39; 1 Lead. Cases in Eq. 351, 356, 359, 1013, 1014; *Brown on Stat. of Frauds*, ch. xix., §§ 437, 442; *Fullar v. Hood*, 10 Casey 365; *Lamborn v. Watson*, 6 Harr. & Johns. 252.

V. If the evidence should be held to warrant the decree that this deed was intended to be only a mortgage, the rule adopted by the vice-chancellor, in stating the account between the parties, was inequitable and unjust. *Kearney v. Macomb*, 1 C. E. Gr. 194; 1 Jones on Mort. §§ 256, 263.

Mr. Jos. Coult, for respondent.

I. The conveyance made by Nelson L. Budd and wife, the respondent, to John A. Van Orden, the appellant, was made as security for a loan of money by way of mortgage, and was not an absolute conveyance. It was properly held to be a mortgage.

II. The appellant having sold the property pledged, without the assent of the respondent, the appellant should account to him for the sum for which he sold it, and not for its supposed actual value. He became trustee for the mortgagor. *Perry on Trusts* § 431 and *Baldwin v. Bannister*, note; *Robinson v. Pettit*, 4 P. Wms. 251; *Cornell v. Pierson*, 4 Hal. Ch. 478; *Jones on Mort.* § 341; *Meham v. Forester*, 52 N. Y. 277.

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III. The appellant lost his right to object to the master's report by failure to file his exceptions; set down the cause for hearing, and give notice thereof, within the time limited in the rule nisi. They were properly stricken from the files. *Weber v. Weitling*, 3 C. E. Gr. 39; *Morris v. Taylor*, 8 C. E. Gr. 134.

IV. The appellant, by the master's report and final decree, is allowed more than in equity he ought to be credited with, and the amount for which he should account is greater than the amount decreed to be due.

The opinion of the court was delivered by

BEASLEY, C. J.

The complainant in this case, who is the respondent in this appeal, made a conveyance in fee of certain lands to the appellant, and the purpose of the bill was to have such absolute deed declared to be a mortgage. In this endeavor he was successful in the court below. The point depended on the effect of the parol evidence, and as such evidence has been fully discussed in the opinion read in the court below by the vice-chancellor, and as I agree in the views expressed by him in this respect, it would be but a waste of time for me, at this time, to pass over that same ground. I concur in the conclusion thus reached, that the deed in question was designed by the parties to it to stand, in substance, as a security for the amount of money advanced by the appellant to the complainant, at the time of its execution.

The only misgiving that I have experienced, touching the correctness of the decree, has been with respect to the propriety of charging the appellant with the share of the complainant in the proceeds of the land sold, on the basis of the price obtained at such sale. The embarrassment is that the whole of such price has not yet come to the hands of the appellant, as he took, in part payment on such sale, a bond and mortgage for a certain portion of the consideration money, and it is now contended, in his behalf, that it is incompatible with correct principle, looking at the case as one between trustee and *cestui que trust*, or princi-

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pal and agent, to charge against him, as so much cash, the moneys included in the mortgage which have not as yet been received by him. The argument is that such moneys may ultimately be lost without any fault on his part, and thus a liability to his principal may never arise.

There is, certainly, some force in this view, and it would be entitled to prevail if the facts of the case presented these parties as standing towards each other in the attitude, under usual conditions, of trustee and *cestui que trust*, or of a similar relationship. According to the view above taken on the merits, the appellant was the holder of the complainant's undivided share in these lands as mortgagee, with an authority to sell such share, rendering an account to the complainant for its product; and if, in good faith, he had proceeded to execute such authority, in behalf of his principal, there can be no question as to his right to have his accounts settled in the manner which the law prescribes for such cases. But the facts show that the appellant cannot be permitted to claim the utmost advantage of such a position as this. By his own showing, in selling this land, he did not intend to act as the agent or trustee of the complainant, but, disowning that character, and asserting his own absolute right to the land, he made sale of it as owner, and acted in that matter for himself alone. Having repudiated his representative capacity in disposing of the premises, the claim which he makes to such capacity, when his accounts are to be adjusted, cannot be considered as very forcible. Dealing with the property as his own, he took this bond and mortgage in his own right, as so much cash. It is not shown that the moneys so received cannot be collected, or are in danger of being lost. The price produced at this sale may, I think, in view of all the evidence, be taken as representing the fair value of the land sold. In this position of things, it does not seem to me to be inequitable, or abnormal, to charge the appellant, in his settlement with the complainant, with the entire amount of such price as so much cash in his hands.

This conclusion leads me to vote for the affirmance, in all respects, of the decree appealed from.

Decree unanimously affirmed.

Davis v. Sullivan.

WILLIAM H. DAVIS, assignee of Norris, appellant,

v..

NAHUM SULLIVAN et al., respondents.

1. A defendant in a chancery suit being decreed a bankrupt between a decree *pro confesso* and a final decree, does not abate or stay the proceedings.

2. A party who, having acquired an interest during the pendency of the suit, applies, under the chancery act, to be made a party in order to move to open the decree, must present, in his petition, a case of substantial equity.

3. Claiming in the court below the right to be let in as a party for a specified purpose, he cannot object, on appeal, to the order refusing his admission, that he had the right to be joined to the suit for another purpose.

On appeal from an order of the chancellor, refusing to open a final decree in order to let in the appellant to answer and defend.

Edward T. Norris transferred to a trustee certain promissory notes for the payment of certain enumerated creditors. Such transfer was conditional on all the enumerated creditors coming in and accepting it. Some time after such transfer and delivery of such notes to the trustee, and after a large number of such creditors had accepted the offer, Norris notified the trustee that he had revoked such assignment and trust. A bill was then filed by some of the creditors who had come in against Norris and the trustee, making the rest of the enumerated creditors parties, to have the trust executed, and setting up, in avoidance of the above-mentioned revocation, that the said Norris had undertaken to procure the assent of the rest of the creditors, and that if he had not procured such assent, he had acted in bad faith. To this bill Norris did not appear, and an order for a decree *pro confesso* having been taken, in the end a final decree was entered against him and the trust was directed to be carried into effect. Subsequent to this final decree, and after the moneys, in a great part, had been distributed, one William H. Davis, assignee in bankruptcy of the said Edward T. Norris, presented his peti-

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tion to open the said decree and to let him in to defend, setting forth, as the grounds of his application, that he had been appointed such assignee during the pendency of the suit, and between the decree *pro confesso* and the final decree; that without notice to petitioner, the complainants, "by the consent and collusion of the said bankrupt," had taken a decree without notifying the court that such debtor had been declared a bankrupt, and that said petitioner had, as his assignee, demanded of the assignee the trust fund; that the trust settlement was a unilateral agreement and had been revoked.

The chancellor refused, on this petition, to make the assignee a party, and to open the decree to let him in to answer &c.

Mr. Gilbert Collins, for petitioner.

In this case, application (by petition filed after decree) was made by the assignee in bankruptcy of a defendant in a chancery suit, first, that he might be admitted as a party to the suit; and second, that the decree might be opened, and he, permitted to defend. The bankrupt had not answered, and the decree, as to him, was *pro confesso*.

This application, and every part thereof, the chancellor denied. From his denial this appeal was taken.

I. The chancellor should at least have admitted the assignee as a party. *Eyster v. Gaff*, 1 Otto 521; Rev. 111 § 42; Rev. 125, § 114; 2 Dan. Ch. Prac. 1460, 1461, and notes.

II. The chancellor should have opened the decree and permitted the assignee to defend.

III. There has been no laches on the part of the assignee.

Mr. J. D. Bedle, for respondents.

If Davis, as assignee, desired to be made a party, it was his business to apply, and not the duty of the complainants to make him a party. *Eyster v. Gaff*, 1 Otto 521; *Esterbrook v. Ahern*, 4 Stew. Eq. 4.

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It is questionable whether an assignee *pendente lite* could be a party, if he does not apply or consent. *Norton v. Switz* 3 Otto 360.

I. Under our statute (*Rev. 110, § 41*), if the assignee could be admitted, he would only stand in place of the defendant Norris and would be entitled, as defendant, to no other rights than Norris. *Guest v. Hewitt, 12 C. E. Gr. 480*.

This, also, is so under the bankrupt act. *Rev. Stat. U. S. 5, § 5047*.

Norris is concluded by decree *pro confesso* and final decree.

II. Laches. Decree executed. The trustee obeyed the decree in good faith.

V. There is no equity in the application. By no possibility could there be anything to be reached but \$657.83, and Davis has no title to that. Besides, it could only be claimed by bill.

The application must show a right to be made a party. *Wether v. Greenfield, 3 Bank. Reg. 179*.

VI. The district court of the United States for New Jersey, in which Davis was appointed assignee, Nixon, J., decided July 1, 1879, that the sale from Norris to Clerihew was valid against a judgment creditor. *Howard v. Clerihew and Norris*.

VII. The transfer of the notes was to pay certain *bona fide* creditors, and its good faith is not questioned in this application. The assignee seeks only to defend under Norris, and to set up defence.

VIII. The assignee must file his original bill if he claims relief on behalf of any creditor, showing his grounds, and giving an opportunity of answer and defence, but we deny, in fact and in law, any right to relief. The nature of the claim, its genuineness, when contracted, how held, and the standing of the holder to attack the transfer, are all controvertible.

IX. This transfer is dated October 5th, 1876. The petition in bankruptcy was filed August 28th, 1878, nearly two years afterwards. The transfer is not void by reason of being within the periods of the bankrupt act, which avoids transfers in fraud

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of it. *Rev. Stat. U. S. (1875) §§ 5128, 5129.* These periods were four months and six months, afterwards changed to two and three months. Act June 22d, 1874, *18 Stat. 1880 ch. 390 § 10.*

But if within the period, there must have been actual fraud. *Tiffany v. Lucas, 15 Wall. 410.*

The policy of the bankrupt act has not been to disturb transfers preceding the periods mentioned, and if the assignee could attack a transfer beyond those periods as against our statute of frauds, he could, I submit, only do it through a *judgment* creditor, and not a general creditor. *In re Collins, 12 N. B. R. 379,* Hunt, J.

The opinion of the court was delivered by

BEASLEY, C. J.

This is an application to admit a person as a defendant to a suit in chancery on the ground that he obtained an interest in ~~the~~ the subject of litigation during the pendency of the proceedings. ~~The~~ This petitioner became assignee in bankruptcy of one of the principal defendants in the suit, the object of the bill being to distribute a part of the property of such party among a certain class of creditors, for whose benefit it had been put in trust. This decree of bankruptcy, which vested the property and rights of the bankrupt in his assignee, was taken between the entering of the decree *pro confesso* and the final decree against the bankrupt.

It is not pretended that the bankruptcy of this defendant operated as an abatement of this suit. It is true, that the general rule is that where an interest in the subject of the suit is obtained *pendente lite* by a stranger to such suit, through the force of general laws, such as assignments in bankruptcy and insolvent acts, such stranger must be joined as a party before the proceedings can be carried further. The distinction is between cases of voluntary alienation and cases of involuntary alienation; in the latter class of cases, the assignee must be made a party; in the former, he may or may not, at the pleasure of the complainant. *Story's Eq. Pl. § 342.* In *Kyster v. Guff, 1 Otto 521*, this dis-

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inction appears to have escaped attention, for in it all assignments *pendente lite* are put on a level, and on that broad ground it is settled that an assignee in bankruptcy, becoming such after the commencement of a suit, need not, of necessity, be joined as a party. In *Cleveland v. Boerum*, 24 N. Y. 613, a similar result is reached, but, as it seems to me, on far more scientific grounds, it being in that case held that, as by force of the law of the United States, an assignee in bankruptcy can carry on the suit in the name of the bankrupt, when it appears that he is aware of the pendency of a suit, his non-intervention in his own name raises an implication that he has elected to waive his defence and to let the proceedings go to judgment in the name of the bankrupt. At all events, it must be considered as settled that a suit is not abated or stayed by a defendant to such suit being decreed a bankrupt during its progress, and that the assignee in bankruptcy will be bound by the subsequent proceedings in such suit. This is the doctrine not only of the cases cited, but also of *Esterbrook Co. v. Ahern*, 4 Stew. Eq. 3.

But while the foregoing doctrine is admitted, it is insisted in the present case that this assignee has a right to be made a party to this proceeding by force of the forty-first section of the chancery act. That provision is to the effect that, on verified petitions, persons who have acquired an interest after the inception of a suit, may be let in as parties. In construing this enactment in *Guest v. Hewitt*, 12 C. E. Gr. 479, this court decided, in substance, that a petitioner under it must show that he would be advantaged by being made a party in respect to the matter touching which he seeks to intervene. In the reported case, there had been a final decree, and the chancellor had refused to admit the petitioner as a party, and that decision was sustained on appeal, for the reason that although the petitioner asked to be made a party so that he might have the final decree opened, he had laid no ground in his petition that could have justified such a course. And herein I find the defect of the present application. There are no sufficient grounds suggested or shown for opening the final decree in this case. We have seen that it is settled that the non-joinder of the petitioner as assignee in bankruptcy is not

In matter of will of Lucy H. Eddy.

even an irregularity, and the fact that the trust in litigation was revoked, is of no force, as such fact was stated in the bill and its effect obviated by the statement of alleged countervailing equities. It does not seem to me that the case presented in this petition gives rise to even a colorable equity as against a result in a suit attained by the usual methods and in due course.

With respect to the suggestion, made here apparently for the first time, that this petitioner should have been admitted, so as to enable him to appeal, if he so desired, from the final decree, to this court, the conclusive answer is, that his petition assigns no such purpose. If he had suggested such a design, it is probable that his application would have been granted by the chancellor. Whether he could have sustained an appeal in the face of a final decree founded on a decree *pro confesso*, is a question now before this court for decision.

The decree of the chancellor should be affirmed.

Decree unanimously affirmed.

In the matter of the last will of LUCY H. EDDY.

In an exceptional case, when strong and well-founded doubts exist as to the mental capacity of a testatrix, and with respect to the force and character of the influence under which the testamentary act was performed, the caveators are entitled to their costs and reasonable counsel fees.

On appeal from a decree of the ordinary reported in *Eddy's Case*, 5 Stew. Eq. 701.

Mr. W. H. Vredenburg and *Mr. B. Williamson*, for appellants.

This is the resistance of Mrs. Louisa Pollock the great-niece and the heir at law of Lucy Eddy, to the probate of a paper claimed to be her will, and dated January 19th, 1875. The tes-

In matter of will of Lucy H. Eddy.

trix was a single woman, and died in 1879. She was eighty-ree years of age at the making of this paper. Her possessions 1875 were valued at over \$200,000. A Miss Chapman, a single woman over forty years of age, and very remotely related to testatrix, obtained from her, by conveyance, shortly before the death of testatrix, property which cost over \$45,000, and by the will in question, about \$40,000 more, making about \$85,000. •

Mrs. Pollock and her brother are given by this paper, through trustees, the joint use, for life, of a store property in New York. The value, in 1875, of Mrs. Pollock's share for life was not over \$3,000. By the former wills of testatrix of 1861 and 1867 (while that store property had constituted a large proportion of the property of testatrix), she had given that property absolutely in fee to Mrs. Pollock and her brother. Afterward, there was a very rapid increase of the estate of testatrix. Notwithstanding this great increase in her estate, and notwithstanding the great value that testatrix really had for Mrs. Pollock, this will of 1875 devised only the store property in trust for Mrs. Pollock and her brother, for life, with remainder to the trustees of the Rahway Library Association, thus restraining its alienation and stripping of its real value to Mrs. Pollock. This strange action, we judge, arose from three causes :

I. A loss of mind and memory on the part of testatrix of sufficient extent to incapacitate her from duly retaining in her memory the object of her bounty and affection.

II. Such enfeebled mind as existed in testatrix, was guided to that act, and led to forget and to become estranged from her niece by the superior will and management of Miss Chapman, who excluded Mrs. Pollock and her friends from the society and companionship of testatrix, from motives of self-interest and malice towards Mrs. Pollock and her husband.

III. Testatrix was induced by Miss Chapman to believe unfounded imputations against caveator's husband.

These positions are fully sustained by the evidence in this case. A word upon the law of capacity.

In matter of will of Lucy H. Eddy.

I. The approved definition of Judge Washington in *Den v. Van Cleve*, as to a disposing memory, was as follows, viz.: "Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty?" Testatrix's capacity will not be found to stand the test. But the most satisfactory test of testamentary capacity is the *capability to transact business with sagacity and decision*. *Gleespin's Will*, 11 C. E. Gr. 523; *Turner v. Hand*, 3 Wall. Jr. 88; *Harrison v. Rowan*, 3 Wash. C. C. 585; *Stevens v. Van Cleve*, 4 Wash. C. C. 262, 268; *Lynch v. Clements*, 9 C. E. Gr. 431.

II. Redfield (*Vol. I. p. 510, § 2, and note*) says on this subject that any important abuse of testatrix's confidence in making her believe unfounded imputations against those entitled to her bounty, is fraudulent, and avoids the will that reflects it. *Dietrich v. Dietrich*, 5 S. & R. 207; *Nursear v. Arnod*, 13 S. & R. 323; *Patterson v. Patterson*, 6 S. & R. 56; *Feardon's Case*, 5 Ves. 633.

III. As has been stated, Miss Chapman's object was two-fold, one to prejudice testatrix against the Pollocks so as to reduce Mrs. Pollock's claims, the other to make sure for herself of the bounty of testatrix. Testatrix was an easy dupe to the calumnies against husband of caveator. If so, the will should not stand. See *Redf. on Wills 516*; *Clark v. Fisher*, 1 Paige 171.

Mr. B. A. Vail and Mr. J. Henry Stone, for respondents.

I. The formal execution of a will having been proved, sanity is presumed, and the burden of proof then shifts to caveators. *Harrison v. Rowan*, 3 Wash. C. C. 580; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Peebles v. Cuse*, 2 Bradf. 226; *Turner v. Cheeseman*, 2 McCart. 245; *Whitenack v. Stryker*, 1 Gr. Ch. 11; *Allaire v. Allaire*, 8 Vr. 312; *Redf. Am. Cas. on Wills 29, 30*, and cases cited.

II. Testamentary capacity is not a question of age, simple impairment of memory or bodily infirmity, but of understanding. If one understands the business he is engaged in, recollects

In matter of will of Lucy H. Eddy.

his property, those whom he desires to be the objects of his bounty, and the manner in which his property is to be distributed, he has the full measure of capacity required to make a valid will. *Harrison v. Rowan*, 3 Wash. C. C. 587; *Stevens v. Van Cleve*, 4 Wash. C. C. 262; *Van Alst v. Hunter*, 5 Johns. Ch. 148; *Stewart's Exrs. v. Lispenard*, 26 Wend. 255; *Potts v. House*, 6 Ga. 324; *Cordrey v. Cordrey*, 1 Houst. (Del.) 269; *Kinne v. Kinne*, 9 Conn. 102; *Stackhouse v. Horton*, 2 McCart. 202; *In re Humphrey's Will*, 11 C. E. Gr. 513; S. C. affirmed, 12 C. E. Gr. 567; *In re Wintermute's Will*, 12 C. E. Gr. 447; S. C. affirmed, 1 Stew. Eq. 437; *Harris v. Betson*, 1 Stew. Eq. 211; *Clark v. Fisher*, 1 Paige 171; *Den v. Trumbull*, 2 Zab. 133; *Den v. Johnson*, 2 South. 454; *S. F. Soc. v. Hopper*, 33 N. Y. 619; *Thompson v. Keyser*, 65 Pa. St. 368.

III. To prove testamentary capacity, opinions of witnesses based upon facts within their knowledge are competent. *Dunham's App.*, 27 Conn. 192.

And unprofessional opinions of old friends are more valuable than opinions of experts of recent acquaintance. *Brooke v. Townsend*, 7 Gill 10.

IV. Where caveators attempt to defeat a will on the ground of undue influence, the burden of proof is cast upon them. Undue influence will not be presumed. *Baldwin v. Parker*, 99 Mass. 79; *Small v. Small*, 4 Greenl. 224; *Boyse v. Rossborough*, 6 H. of L. Cas. 2; *Tyler v. Gardiner*, 35 N. Y. 559.

V. To establish the presence of undue influence, there must be shown, as present and operating at date of will—

(a) Importunity incapable of being resisted, by reason of weakness.

(b) Importunity harassing the testator into submission.

(c) Importunity yielded to for the sake of peace.

(d) Physical restraint or coercion.

(e) Threats.

(f) False statements.

In matter of will of Lucy H. Eddy.

The influence of affection, of kind offices, or even of decent persuasion, will not invalidate a will. Influence, to be undue, must be a fraudulent one, controlling the will, and destroying free agency. *Marshall v. Flinn, 4 Jones (N. C.) 199; Eckert v. Flowry, 43 Pa. St. 46; Elliott's Will, 2 J. J. Marsh. 340; Lynch v. Clements, 9 C. E. Gr. 434.*

The opinion of the court was delivered by

BEASLEY, C. J.

With respect to the principal feature of this litigation, I agree with the views expressed by the chancellor, to the effect that the writings propounded should be admitted to probate.

But, upon a careful consideration of the facts of the case, I have been led to the conclusion that there should be a modification of the decree, so far as to allow costs and counsel fees to the contestants. The case, I think, is an exceptionally strong one on the side of the caveators. It would serve no useful purpose to discuss the evidence, or even to sketch the case in outline; it is enough to say that the circumstances were such as necessarily to excite well-founded doubts as to the mental capacity of the testatrix, and as to the force and character of the influence under which the testamentary act in question was performed, and that, therefore, there was plainly reasonable cause for the investigation induced at the instance of these caveators. Therefore, in my opinion, as I have said, their counsel fees and costs should be given to them out of the estate.

With respect to the amount of allowance: The investigation was necessarily protracted, and related to a subject of importance. I think that \$2,500 should be allowed for the services of counsel in both courts, together with the costs of the caveators in each court.

The decree should be reversed, in order to be modified in these respects.

For affirmance—DEPUE, MAGIE, REED; VAN SYCKEL, GREEN—5.

Davis v. Clark.

For reversal—BEASLEY, C. J., DIXON, KNAPP, PARKER,
SCUDDER, CLEMENT—6.

THOMAS W. DAVIS, appellant,

v.

JACOB F. CLARK, respondent.

1. The vendee of land cannot claim, in a foreclosure suit, a deduction from the mortgage-money, on the ground that his vendor, who was not the mortgagor, misstated the number of acres of the land conveyed, and that the vendor of such vendor, who was the mortgagee and complainant, when he sold such lands, made a similar misstatement.

2. To authorize such deductions, the mortgagee and the owner must be privies in contract.

3. A sold a farm to B, misstating the number of acres, taking a mortgage for part of consideration. B sold, making a similar misstatement, to C who assumed payment of the mortgage.—*Held*, on a foreclosure by A, that C, could not set up these facts in order to offset his damages against the mortgage.

On appeal from a decree of the chancellor, reported in *Clark v. Davis*, 5 Stew. Eq. 530.

Mr. P. L. Voorhees and Mr. James Wilson, for appellant.

I. The mortgage sought to be foreclosed in this case is for part of the purchase-money of the mortgaged premises, conveyed by the respondent as a farm containing two hundred and forty-four acres, when in fact, and as it was afterwards discovered and ascertained, it only contained about two hundred and twenty-two acres.

II. The appellant is entitled to relief in this case on the answer filed by him, without filing a cross-bill. *O'Brien v. Hulfish*, 7 C. E. Gr. 473, 476, 477; *Dayton v. Melick*, 12 C. E. Gr. 362, 5 Stew. Eq. 570.

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III. The appellant is entitled to the defence set up in his answer, and to have the mortgage debt of the respondent reduced proportionate to the difference between the contents of the mortgaged premises, as represented at the time of the conveyance by the respondent, and the true and actual contents thereof, as afterwards ascertained. *1 Story Eq. Jur.* §§ 141, 152, 156, 193; *2 Jones on Mort.* § 1506; *Bingham v. Bingham*, *1 Ves. sen.* 126; *Cocking v. Pratt*, *1 Ves. sen.* 400; *Calverley v. Williams*, *1 Ves. jun.* 210; *Hill v. Buckley*, *17 Ves.* 401; *Champlin v. Layton*, *6 Paige* 189, *18 Wend.* 407; *Belknap v. Sealey*, *2 Duer* 570; *Quesnell v. Woodlief*, *2 Hen. & Munf.* 173, note; *Nelson v. Matthews*, *2 Hen. & Munf.* 164; *Harrison v. Talbot*, *2 Dana* 258; *Miller v. Chetwood*, *1 Gr. Ch.* 199; *Coster v. Monroe Mfg. Co.*, *1 Gr. Ch.* 467; *Blair v. McDonough*, *1 Hal. Ch.* 327; *Course v. Boyles*, *3 Gr. Ch.* 212; *Hopper v. Lutkins*, *Gr. Ch.* 149; *Waldron v. Letson*, *2 McCart.* 126; *Weart v. Rose*, *1 C. E. Gr.* 290; *State v. Jersey City*, *6 Vr.* 381; *Curmins v. Wire*, *2 Hal. Ch.* 73; *Miller v. Brolasky*, *4 Hal. Ch.* 626, 789, *1 Stock.* 806.

Mr. M. P. Gray and Mr. A. Browning, for respondent.

The opinion of the court was delivered by

BEASLEY, C. J.

The essential facts of this case may be thus stated: Clark, the respondent, was the owner of a certain tract of land, which he sold and conveyed to one Josiah Davis, taking from him a mortgage for a part of the consideration. Josiah Davis sold and conveyed these same premises to Thomas W. Davis, who is the appellant, and who, in part payment of the price agreed on, assumed this mortgage. The bill was for the foreclosure of the mortgage thus assumed. The defence to such proceeding is, that the quantity of land, in a material degree, was misrepresented, first on the sale of such land by Clark to Josiah Davis, and second, by the latter on his sale to the appellant, the con-

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tention being that, to the extent of such deficiency, there should be a rebate from the sum due on the mortgage.

But such a contention has neither precedent nor principle to rest upon. The flaw in the position is, that there is no privity of contract between the appellant and the respondent touching the quantity of land in question. The effort, therefore, is to recoup the damages, as against this mortgage, arising from the breach of a contract to which the appellant was not a party, and is not a privy. If, in point of fact, the respondent, when he sold this property to Josiah Davis, misstated the number of acres contained in the tract, so as to render himself answerable in a suit, such right of action has not passed to the appellant, by the conveyance of the premises by Josiah to him, for there is no covenant in the deed, to that effect, running with the land. When such covenant exists, an offset of the kind now claimed may be made, and such effect is plainly justifiable, on the principle that as the covenant runs with the land, it creates a privity of contract between the subsequent grantee of the premises and the original grantor. Such was the ground of decision in the case of *Coster v. Monroe Mfg. Co.*, 1 Gr. Ch. 467. But, as has been said, such conventional relationship is, in the present case, entirely wanting. If the respondent has broken his contract with Josiah Davis, it is for him to vindicate his rights, for he has never transferred to this appellant the right to represent him in this respect. For it is confounding all legal ideas to assert that because Josiah Davis, on his part, has subsequently, and in a completely independent transaction, broken a similar contract made with the appellant, that thereby a right of action accrued to the latter, not only against Josiah Davis, but likewise against the grantor of Josiah Davis, with whom he has no connection, by way of stipulation, either directly or indirectly. If Josiah Davis has injured the appellant, by means of breaking his contract or otherwise, he is answerable to him for the resulting damage, but from such liability it is impossible to deduce a transfer by the former of a right of action which he has against a third party. Besides, if such a transmission of a cause of action could, by any possibility, be implied, it is obvious that

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a proceeding enforcing such a right, Josiah Davis would be a necessary party. For if, in this action, to which Josiah Davis is not joined, it should be found that the respondent had broken his bargain with him, and if the appellant should be permitted to offset, against the money due on this mortgage, the damage so resulting, it is undeniable that Josiah Davis would not be bound in any degree by such a result, and he would be at liberty, unaffected by such decree, to prosecute the respondent on the same ground, for any loss sustained by him. So, a decree in the respondent's favor on the issue in this suit, whether he violated his agreement with Josiah Davis, would be no bar against an action for the same cause by the latter. The attempt to invest the appellant with the right claimed is not only inconsistent with correct principle, but is full of consequential crudities.

It will be found, upon looking into the authorities, that the doctrine which prevails in equity by force of which a deduction is allowed to be made from the moneys due on a mortgage, by reason of damages having been sustained by a deficiency in the stipulated quantity of land conveyed, is the effect of the equitable principle that in a court of chancery the vexation of a circuit of action will be obviated as far as practicable. Where the mortgagee is liable to the mortgagor for damages in consequence of the failure of the land to come up to the represented acreage, an offset of such damages will be allowed in a foreclosure of a mortgage given for the price of the land. In such a situation, the stipulation as to the number of acres is an independent term from the stipulation for the payment of the price, and the offset alluded to is made by way of recoupment and in order to lessen the litigation. It is on this ground that the decisions rest, and no case has been referred to, that carries the doctrine beyond the point of permitting such offset in cases in which the mortgagee has a right of action against the mortgagor. And in this case no such right of action exists.

Let the decree be affirmed.

Decree unanimously affirmed.

Fuller v. Fuller.

WARREN F. FULLER, appellant,

v.

ANNA M. FULLER, respondent.

Mr. Theo. Ryerson and Mr. G. Collins, for appellant

Mr. J. B. Vredenburg, for respondent.

On appeal from a decree founded on the following findings of Mr. J. D. Bedle, advisory master :

The evidence in this case, on each side, is very unsatisfactory in many respects, yet, after a good deal of examination and care, I have reached the following conclusions :

1. That the defendant is guilty of adultery, and particularly on September 27th, 1878, in Jersey City, with some person unknown.

2. That the complainant is also guilty of adultery, and particularly with Margaret Frauham, December 1st, 1878, in Jersey City.

3. As to condonation: The inclination of my mind is, that this defence is sustained, yet a definite determination of it is unnecessary.

4. The prayer for divorce is denied, and the bill dismissed.

5. The complainant to pay the costs of both sides, and defendant to have liberty to apply for any order proper as to counsel fees, disbursements and alimony pending the suit.

The opinion of the court was delivered by

BEASLEY, C. J.

This was a bill filed by a husband against his wife for a divorce, on the ground of her having committed the crime of adultery. In her answer, the wife denied this charge, and re-

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criminated the husband. The master who heard the case in the court of chancery advised a decree refusing the prayer of the bill, putting his conclusion on the ground that, "after a good deal of examination and care," he had become satisfied that the complainant as well as the defendant had been guilty of a violation of their matrimonial duty in the respect alleged. He, however, says "that the evidence on each side is very unsatisfactory in many respects."

Upon a careful review of the case in this court, we have concluded that the decree should be affirmed, but we place this result on the ground that the principal testimony on each side is so untrustworthy, as well on account of the bad character of the witnesses as of the great improbability of their narrations, that it is not sufficient for the purpose of founding a conclusion of the guilt of either the husband or the wife of the offence charged.

Let the decree be affirmed.

Decree unanimously affirmed.

THOMAS E. ALLEN et al., appellants,

v.

ELIAS S. WILLIAMS et al., respondents.

1. Where a statute relating to drainage authorized the commissioners to purchase a mill property, and such commissioners, having previously made an assessment to meet the general expenses of the scheme, entered into a contract to purchase under a large penalty; and not being in funds at the day for performance, in consequence of the non-payment, in part, of such assessment, advanced their own moneys to make up such purchase-money—*Held*, on bill filed, that they were entitled to be re-imbursed by an equitable enforcement of such assessment.

2. When persons acting for others under statutory authority advance moneys in good faith and beneficially for the persons whom they represent, re-imbursement of such moneys will, as a general rule, be allowed in a court of equity.

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3. The claim in this case held to be an equitable one, and one which, being equitable, and also for an unliquidated amount, could not be enforced by *mandamus*.

On appeal from a decree of the chancellor, whose opinion is reported in *Williams v. Allen*, 5 Stew. Eq. 485.

Mr. B. Williamson, for appellants.

Mr. H. C. Pitney, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

The facts upon which the bill in this case rests are fully stated in the opinion of the chancellor, and consequently it does not appear to be necessary at this time to do more than refer to those which seem to me necessary to render perspicuous the views about to be expressed on the several points raised in the argument before this court.

The object of the bill is to enforce certain assessments that were made by the three original commissioners by virtue of an act entitled "An act to enable the owners of swamps and marshy lands lying on the upper Passaic and its tributaries, in the counties of Morris and Somerset, to drain the same," approved April 21st, 1868, (*P. L. of 1868 p. 1181*). The validity of this assessment is not in question, as it has already been accredited by a decision of this court. Having made this assessment, these commissioners entered into a written contract for the purchase of a certain mill property, known as Dunn's mill, and therein bound themselves, in a penalty of \$3,000, to pay for the same within a time stipulated. On a bill exhibited by the present defendants, calling in question the power of these commissioners in this respect, the chancellor justified such exercise of authority, and, "with the consent of the parties in open court, ordered the commissioners to hold such mill property in trust for the purposes of said act." Prior to the making of this decree, the time fixed for the payment of such property, by the terms of their contract, having

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arrived, and not having collected from the assessment before mentioned sufficient moneys for such indebtedness, the commissioners made up the deficiency out of their own resources, and thus obtained a title for the property in question. At this stage of these proceedings, these commissioners were superseded by the appointment of their successors, and after that event, the statute under which these proceedings had taken place was repealed, saving, however, all rights which had been acquired under it. It has been already adjudged that after this repealing law, the right to enforce and make assessments requisite to settle all outstanding legal liabilities resided in the new board of managers. Two of the original managers have died, and the complainants are the survivors and the representatives of those deceased, their object being to levy, through the aid of the court of equity, on the lands originally assessed by them, so much of the assessment as will be sufficient to re-imburse them for the moneys paid by them out of their private means in the purchase of the mill property before mentioned. These are some of the facts extracted from the bill, which has been demurred to.

The claim to relief thus made is opposed, principally, on two grounds, the first of these being, that the advance of the moneys of which re-imbursement is sought was a breach of duty on the part of these managers, and consequently that they have no standing to ask for aid from a court of equity. In support of this position, it is insisted that the statute in question does not confer upon these officers the right to borrow money, and that the exercise of such authority is contrary to its spirit and policy.

So far as the facts are concerned, I think this position well taken, for I can find in none of the provisions of this law, nor in its general object, any appearance of an authority to resort to loans for the purpose of carrying into effect the statutory scheme. The plan upon which this improvement was to have been made is obviously based on moneys in hand derived from assessments, and it must, therefore, be conceded that when these officers paid the consideration, in part, for these lands with their own moneys, they did an act for which they can point to no authority in the law under which they were acting. But it does not follow from

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this concession that these land-owners, for whom these complainants were agents in this matter, can take to themselves the benefit of this purchase without paying for it. The bill of complaint, in this respect, alleges that these premises were purchased "at the wish and desire" of these land-owners, and it was afterwards decided in the chancery suit already referred to, that such purchase was one of the specified duties imposed on these complainants by this statute, and by the same clause it was directed, with the consent of these land-owners, who were defendants in that suit, that the complainants should hold said property in "trust for the purposes of said act." When this decision was made, the moneys now in question had been advanced by these managers, and when, therefore, in that position of things, these defendants assented to a decree which vested in them the beneficial use of these lands, it must be inferred that they intended to pay for it. Such an assent must be deemed an approval, in a most conclusive form, of the entire transaction embraced in this purchase. Nor do I think that in the absence of such ratification, these complainants would have been destitute of a right to reclaim these moneys. They were officially bound to acquire this property, and accordingly they entered into an agreement to take the title to it in a designated time, binding themselves to comply with such contract under a penalty of \$3,000. This engagement appears to have been in all respects reasonable, for they had already made an assessment which, if paid in due course, would have put them in possession of the requisite funds. These just expectations were not realized, in consequence of the default of these defendants not paying their quotas of the assessment in question. The consequence was, that the complainants were placed in the dilemma of either losing the land, which it was their duty to obtain, and of subjecting their principals to a heavy loss under the penal clause in the agreement, or of raising the money out of their private means. It does not seem to me that, in adopting the last branch of this alternative, they acted in a manner that is open to the faintest hostile criticism. Such conduct seems to me not only unobjectionable, but praiseworthy, and certainly the censure of those who, by their failure to pay

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their just dues, had necessitated it, is entitled to no consideration. These payments can hardly be called voluntary, for they were made under the constraint of an unexpected emergency. They were plainly beneficial to the body of persons represented by these managers, and moneys expended under such conditions can, upon the ordinary principles of equity, be reclaimed by the agent making such outlay. Such is the rule often exemplified in the dealings of courts of equity with the accounts of trustees. In that particular, the doctrine is, that all disbursements which the court, on application, would have sanctioned, will be affirmed if the trustee makes them without order, and that expenditures for the good of the estate will, under any ordinary circumstances, be allowed to him. In *Gibson v. Bott*, 7 Ves. 150, the court said it would protect an executor in trust in doing, without an order, what it would order him to do. The following cases exhibit other applications of the principle: *Fontaine v. Pellett*, 1 Ves. 343; *Murry v. De Rottenham*, 6 Johns. Ch. 52; *Mathews v. Dragand*, 3 Desaus. 25; *Attemus v. Elliott*, 2 Barr 62. The present case, with respect to the matter now in hand, calls for a settlement founded on a principle quite as liberal as is this equitable doctrine. The disbursement in question was constrained by the default of the persons who now except to its enforcement, while, at the same time, they have accepted its benefits; it was made in good faith, by statutory officers, in behalf of those whose interests had been confided to their keeping, and it would be strange indeed if such circumstances would not lay, in a court of equity, a claim for repayment.

In connection with the act of the complainants in purchasing this mill property, their subsequent conduct with respect to it was strongly condemned by the counsel of the defendants, in his argument before this court. The part of such conduct that was deemed objectionable was the act of the complainants in dealing with this property after the expiration of their own term of office, and after the appointment of their successors. After these events, what the complainants did was this, they tore down the mill-dam and sold the mill thus mutilated; it is urged that, being out of office, this was a gross breach of trust. But this, it seems to

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me, is not a feature that will injuriously affect these complainants' right to a standing in equity, and it is that right alone that, on this demurrer, is drawn in question. Grant that it be true that these managers have despoiled and squandered the trust estate, how does it follow that from such an incident, they will lose their lien on the assessment in question, if they can show, after all deductions for mistakes or misconduct in regard to the property that was in their hands, the balance is in their favor? At the present time this court is not called upon to decide whether or not there has been any abuse of their authority on the part of these complainants; that is a matter that will be settled in the progress of this cause. I can see no solidity in the contention that, because of the misconduct of these agents, they have forfeited all claim to enforce this lien, no matter what the amount of the loss of the *cestuis que trust* may be relatively to the disbursements by their trustees. If the latter amount exceeds the former, the complainants, in my opinion, have a right to have such difference raised by means of the assessment in question, in their favor, by the court of equity.

The remaining objection to the right to exhibit this bill consists of the position that the complainants have an adequate and easy remedy at law, by a *mandamus*, to compel the present managers to raise by sale, under the original assessment, the moneys in question. But even on the assumption that the complainants' rights could have been effectuated by the process indicated, it does not follow that such process must, of necessity, be resorted to. The test of the right of the complainants to pursue their present course of law, is the consideration whether the subject matter of the litigation is, from its inherent nature, of equitable cognizance, for if this be so, such jurisdiction cannot be ousted by the fact that a common law remedy to enforce such right also exists. And that this particular matter now in controversy is of equitable cognizance, appears to me very plain. An action in a common law court would not have lain for these moneys. It is not a claim *in personam*, but *in rem*, for the statute authorizing this procedure does not make these defendants personally liable, but imposes the burthen of the cost of the improvement on a

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definite portion of their lands. Also, the demand for the money advanced by those managers has the qualities, not of a legal, but of a conscionable right. Its elements are these: by the purchase of this mill property, the vendor of such property became vested with a lien in equity upon the lands of the defendants, embraced in the assessment, as security for the payment of the consideration money, and when the complainants paid that money in ease, and for the benefit of, the defendants, and in a due discharge of their official duty, they, by that act, became entitled to be subrogated to the rights of suit for and in such security; and the right to this subrogation is plainly cognizable in a court of chancery. I am not aware that such a right could be executed under the forms of a court of common law. That it could not have effect given to it by the process of *mandamus*, seems very evident. If the right to subrogation was a legal right, and the amount of the complainants' claim was not in dispute, then, indeed, an order from the supreme court contained in its prerogative writ, might well go to the present commissioners to raise such definite amount by enforcing the assessment. But, as has been said, subrogation is an equitable contrivance, and the amount of the claim is so far from being admitted, that, as we have seen, the defendants insist that deductions, to an unascertained extent, must be made from the moneys advanced by these managers. In proceedings of *mandamus*, how could such questions be settled? There seems to be no precedent for such an attempt, and it is altogether inconsistent with the nature of the remedy, which is only appropriate when the duty the performance of which is sought to be enjoined is of a fixed and definite character. I know of no instance in which a *mandamus* has been issued for the purpose of raising an unliquidated amount of money. In the case of *Regina v. 5 Q. B. 887, 894*, it was explicitly decided that a *mandamus* would "not go for the payment of a sum not ascertained

For these reasons, I think the decree appealed from should be affirmed.

Decree unanimously affirmed.

Cubberly v. Cubberly.

SAMUEL D. CUBBERLY, appellant,

v.

JAMES D. CUBBERLY et al., respondents.

A third person may maintain a suit to enforce a promise made, on a lawful consideration, for his benefit, and the promisee is not a necessary party to such suit.

On appeal from a decree of the Chancellor, reported in *Cubberly v. Cubberly*, 6 Stew. Eq. 82.

Mr. Chilion Robbins, for appellant.

Mary M. Danser, of New York, made her will about December 13th, 1876, by which she bequeathed and devised a large amount of property to various persons and institutions. The will contained a residuary clause, giving her executor power to distribute the residue of her estate, after satisfying her special devises and bequests, "to such charitable or religious societies or associations and corporations, or for such other benevolent purposes, as he may see fit."

Mary M. Danser died in the city of New York, in February, 1877, without revoking or altering her will. She left no lineal descendants. Her next of kin were Smith J. Danser, of Dayton, Ohio, who was her uncle; Mrs. Mary Golder, of New York city, and Mrs. Susan S. Robinson, of New Bedford, Mass., who were her aunts. Her next of kin were entitled, at her death, to all of her estate not disposed of by her will. The complainants and defendant and Alex. H. Cubberly are children of Lucy A. Cubberly, who was, in her lifetime, an aunt of the testatrix, and are therefore first cousins of the testatrix. The will was offered for probate in February, 1877, before the surrogate of New York county. Its admission to probate was contested by Smith J. Danser and others. So far as appears by the bill, these parties contestant never withdrew their opposition till the matter was finally compromised.

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“Whilst these legal proceedings were pending, and with full knowledge” &c., Samuel D. Cubberly “did then and there represent and tell to the said Mary A. Golder and Francis S. Averson that the said Smith J. Danser had given up all hopes of success in said legal proceedings, and had abandoned the same and turned to his home in the state of Ohio, all of which was untrue and was known to him to be untrue at the time.”

The defendant proposed that Mrs. Golder and Mrs. Robinson “should give to him a power of attorney authorizing him to take such steps as he might see fit to recover any interest said Mary A. G. and S. S. R. might have in the estate of the said Mary M. Danser, deceased, other than specific legacies, and to do everything necessary and proper thereto; that they should give him one-half of all such interest that might be recovered, and that he should pay all the costs, fees and expenses of such measures as he might undertake in pursuance thereof.” This proposition was at that time (March, 1877) rejected. It was repeated at different times, and finally accepted.

The contest over the will was compromised September 20th, 1877, the will admitted to probate, and the residuary clause decreed to be null and void. The effect of this was to distribute the residue of the estate to the next of kin of the testatrix above named. The said Golder and Robinson each received out of the fund so distributed about \$76,000, and that each of them paid to the defendant \$38,000, thus giving him \$76,000. The complainants each claim one-fifth of this, after deducting from the whole sum the fees, costs and expenses paid by the defendant under the terms of the agreement.

The foundation of their claim is the above-alleged agreement and promise of the defendant to divide with them.

I. The responsibility of the defendant to the complainants any, arises solely from the agreement above stated.

It is admitted that “if one person make a promise to another on lawful consideration, for the benefit of a third person, the third person may maintain an action, even at law, upon the promise.”

But this case cannot be ruled by that principle.

In this case, the maxim *ex dolo malo non oritur actio*

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plies. *Broom's Max.* 702; *State v. Thatcher*, 6 Vr. 445; *Nicholson v. Gooch*, 5 E. & B. 999; *Tivaz v. Nicholls*, 2 M. G. & S. 500.

II. That the complainants might have set up a case which, leaving out the statement of the false pretence, would not have been liable to demurrer, makes no difference. The defendant, in case of such omission, might have set it up by plea or introduced it in evidence, when the result would have been the same as if it had been stated in the bill.

The rule that no man shall set up his own iniquity as a defence is never applied where the rights of third parties are to be affected. *Hooper v. Lane*, 6 H. of L. Cases 443, 461; *Smith v. Hubbs*, 10 Me. 71; *Cowles v. Bacon*, 21 Conn. 465; *Nellis v. Clark*, 20 Wend. 24.

The defendant has done right in demurring. A man is not justified in omitting to demur to a bill, even if fraud is charged, against which he desires to answer. *Nesbit v. Bevridge*, 9 Jur. (N. S.) 1044; *Mitf. Pl.* 128; *Broom's Max.* 459; 2 *Dan. Ch. Pr.* 1399.

III. The defrauded parties, Mrs. Golder and Mrs. Robinson, have the right to rescind the agreement and recover back the money paid the defendant, upon the ground of gross fraud. *Kerr on F. & M.* 296 &c.; *Pearsall v. Chapin*, 44 Pa. St. 9.

The bill nowhere states that they, knowing of the fraud, have confirmed or acquiesced in the contract; this must fully appear, or their right to avoid the agreement and proceed against the defendant is unaffected. *Pearsall v. Chapin*, *sup.*; *Kerr on F. & M.* 295, 300, 309, and cases cited; *Add. on Con.* §§ 140, 1410; *Bishop on Con.* §§ 203, 205; *Thurston v. Blanchard*, 23 Pick. 18; *Stevens v. Austin*, 1 Metc. 557; *Huguenin v. Bosely*, 14 Ves. 273; *Bridgman v. Green*, Wilm. Judg. 58; *Reynolds v. Rochester*, 4 Ind. 43.

IV. The complainants are equally guilty with the defendant in the fraud charged. It was held in *Lincoln v. Claflin*, 7 Wall. 132, that the subsequent participation by a person in a

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fraud and its fruits was as effectual to charge him as preconcert and combination for its execution.

So a person is innocent of a fraud only so long as he does not insist upon deriving any benefit from it. When he does so insist, he at once becomes a party to the fraud. *Scholefield v. Templer, Johns. (Eng.) Ch. 155*; *1 Story Eq. Jur. § 193*; *Hartoff v. Hartoff, 21 Beav. 259*; *Robson v. Colze, 1 Doug. 228*; *People v. Mather, 4 Wend. 261*; *Burtis v. Tisdall, 4 Barb. 571*.

Where several are concerned in a fraud upon the rights of a third person, equity will not afford them relief as against one another. *Bolt v. Rogers, 3 Paige 154*; *Odenheimer v. Hanson, 4 McLean 437*; *Van Doren v. Staats, 2 Pen. 887*; *Gregory v. Wilson, 7 Vr. 315*. And this is so even though the greater fraud may be on one side or the other. *Bolt v. Rogers, sup.*; *Nellis v. Clark, 20 Wend. 24*.

When once a fraud has been committed, no one can derive any benefit from it, except it be an innocent person who subsequently acquires an interest in the subject matter of the fraud, and from whom some consideration passes. In such cases, and when it can be done, such innocent persons are made whole. *Scholefield v. Templer, sup.*; *Prero v. Walters, 4 Scam. 35*.

The rule that where the fraudulent transaction has been completed, and the money received by one wrong-doer, an action will lie against him in favor of any other one of the wrong-doers, for his share, is not in force in this state. *Todd v. Rafferty, 3 Stew. Eq. 254*; *Watson v. Murray, 8 C. E. Gr. 257*; *Gregory v. Wilson, 7 Vr. 320*.

V. Courts do not sit to divide up the fruits of fraud, not even upon the application of a person to whom the money in part belongs, who is innocent of the fraud, and especially if such person would be liable to the party defrauded for the share received by him. *Todd v. Rafferty, 3 Stew. Eq. 254*; *Gregory v. Wilson, 7 Vr. 315*; *Watson v. Murray, 8 C. E. Gr. 257*; *Van Doren v. Staats, 2 Pen. 887*; see, also, *Price v. Polluck, 8 Vr. 44*; *Church v. Muir, 4 Vr. 318*.

VI. If the complainants are entitled to any relief at all, Mrs.

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Golder and Mrs. Robinson are necessary parties, either complainants or defendants, to this suit.

If the arguments on which the defendants rely may be rescinded by the parties defrauded, and they may proceed at law or in equity to establish their rights against the defendant, or any who may take through him, then the necessity of their being joined in and concluded by this suit is at once apparent. The rights of the parties concerned cannot be settled and protected, and complete justice done, in their absence. *Hicks v. Campbell*, 4 C. E. Gr. 183; *Irick v. Black*, 2 C. E. Gr. 189; *Keller v. Keller*, 3 Stock. 158.

Mr. E. L. Campbell, for respondents.

I. Neither Mary Ann Golder, Susan S. Robinson nor Frances F. Avery had any interest in the money for which the respondents bring suit. So far as they are concerned, the agreement is executed, and no injury to them is alleged or indicated. Mrs. Avery was a mere attorney in fact. 1 Story Eq. Jur. (11th ed.) 202, 203, and cases; *Sherwood v. Andrews*, 2 Allen 79.

II. Even if it were otherwise, the bill alleges that they still purpose we shall have the money; this, if material, is part of our bill to be proved, and necessarily by them as witnesses.

III. The bill sets out a "trust" which a court of equity will execute. Wil. Eq. Jur. *423; *Eaton v. Cook*, 10 C. E. Gr. 55; *Day v. Roth*, 18 N.Y. 448; *Foot v. Foot*, 58 Barb. 258.

IV. The bill presents a case of "account," of which a court of equity will take jurisdiction. 1 Story Eq. Jur. 442, 459, 459 a, and cases; 3 Black. Com. 164.

V. The bill sets out a case of equitable jurisdiction on the ground of "discovery." 1 Story Eq. Jur. 690, 691, and notes; 2 Id. 1483, 1488, 1489.

VI. The bill presents a case of equitable jurisdiction on the ground of "fraud." 1 Story Eq. Jur. 184, 185.

Perrine v. Vreeland.

The opinion of the court was delivered by

BEASLEY, C. J.

The points argued before this court are the same questions presented for consideration in the court of chancery ; and being of opinion that the case, in such respects, was properly disposed of, I shall vote to affirm the decree.

Decree unanimously affirmed.

MARY M. PERRINE, administratrix of estate of William Vreeland, deceased, appellant,

v.

PETER V. B. VREELAND et al., respondents.

On appeal from a decree of the chancellor, reported in *Perrine v. Vreeland*, 6 Stew. Eq. 102.

Mr. S. B. Ransom, for appellant.

Messrs. Bentley & Hartshorne, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

The facts of this case, and the reasons for the conclusion embodied in the decree appealed from, are fully stated in the opinion of the chancellor ; and as I entirely concur in the views thus expressed, I shall vote to affirm that decree, on the grounds thus stated.

Decree unanimously affirmed.

Richardson v. Peacock.

WILLIAM B. RICHARDSON, appellant,

v.

JAMES M. PEACOCK, respondent.

Defendant sold to complainant the fixtures and good will of a business which largely consisted in purchasing poultry in designated districts, and shipping it to New York for sale; and also covenanted with complainant that he would not, at any time, send or ship to New York any poultry coming from those districts. Afterwards, he engaged in New York in the sale of poultry on commission, ordering all his supplies to be shipped from those districts, sometimes in advance of his sales, sometimes to fill contracts of sale previously made.—*Held*, that in so doing he was violating his covenant, and should be restrained.

On appeal from a decree of the chancellor, reported in *Richardson v. Peacock*, 1 *Stew. Eq.* 151.

Messrs. A. C. Scovel and P. L. Voorhees, for appellant.

I. The said James M. Peacock, notwithstanding the covenant entered into by him in the pleadings in this case mentioned and referred to, before and at the time the injunction in this case was served upon him, had the right to carry on the business in which he was then engaged in the city of New York, to wit, the business of selling poultry on commission for such persons as would ship or send poultry to him to sell for them on commission.

II. In selling poultry as a commission merchant or agent of others who sent and shipped their poultry to said Peacock at New York city, to sell for them on commission, he, the said Peacock, did not, in any way or manner, violate his said covenant.

III. The said Peacock, notwithstanding said covenant, has the right to carry on the business in the pleadings and evidence in this cause mentioned and described, and which was carried on by him at the time when the bill in said cause was filed.

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Richardson v. Peacock.

Mr. S. H. Grey, for respondent

I. The covenant between Richardson and Peacock, upon which the bill was filed, was a valid contract. *Mitchell v. Reynolds*, 1 P. Wms. 181; *Hitchcock v. Coker*, 6 Ad. & Ell. 439; *Pilkinton v. Scott*, 15 M. & W. 657; *Ross v. Sadgbeer*, 21 Wend. 167; *Horner v. Greaves*, 7 Bing. 735; *Chappell v. Brockway*, 21 Wend. 163; *Whittaker v. Howe*, 3 Beav. 383; *Duffy v. Shockey*, 11 Ind. 71; *Gale v. Reed*, 8 East 86.

The opinion of the court was delivered by

DIXON, J.

This bill was filed to restrain the defendant from violating his covenant.

It appears that up to November 14th, 1863, the defendant was engaged in the poultry business at No. 121 South street, Philadelphia, which was carried on by his purchasing poultry in the counties of Salem, Cumberland, Camden and Gloucester, in this state, and in South street, for certain persons in New York and Washington, to whom he sent it, at a commission of ten per cent., and by his making similar purchases for himself, and shipping to commission merchants in New York or Washington, for sale on his own account, at a commission to them of five per cent. This business, with the fixtures and good will, the defendant sold to the complainant, on the date mentioned, for \$2,000; and he likewise covenanted with complainant that he would not at any time send or ship any poultry coming from said counties or South street, to either New York or Washington; and that he would not ship any poultry to said cities so that the same might in any way interfere with or prejudice the business he sold out. This is the covenant which it is claimed he has broken.

The case is not one of a mere implied contract, growing out of a sale of the good will of a business. Such a sale, without more, while it does not prevent the vendor from carrying on a similar business, and, perhaps, dealing with the old customers,

Richardson v. Peacock.

will prevent his soliciting the old customers by any means other than the general advertisement of his business. *Labouchère v. Lawson*, L. R. (13 Eq. Cas.) 322; *Leggott v. Barrett*, L. R. (15 Ch. Div.) 306.

But here there is an express covenant, the binding force of which is not impugned by the defendant, and the sole question is whether it has been violated.

The defendant admits that at the filing of the bill he was engaged as a commission merchant in the poultry business in New York city; that he had but five consignors, one stationed in South street, Philadelphia, one in Gloucester county, and three in Salem county; that his business consisted in making sales of poultry in New York, and ordering these parties to ship to the purchasers what was required to fill his contracts, and also in receiving such poultry as they might ship to him in New York, and selling it for them; and in either case, his compensation was a commission on the price.

We think this was in violation of his covenant. True, he did not personally ship or send the poultry which he had agreed not to ship or send, but he ordered and procured it to be shipped and sent, for his own gain, and in such a manner as to lessen the opportunities for profit which the complainant might otherwise have enjoyed in his business. It is not as if the defendant had simply established himself in the poultry commission business in New York, and there had sold whatever was sent him, although, included in it, had been poultry coming from the interdicted territory; but the fact is, that his whole business in New York rested upon his procuring shipments from this territory, and he actively solicited and caused such shipments to be made.

These transactions were plainly prohibited by the terms of his bargain, and the chancellor rightly decreed that he should be restrained.

Decree unanimously affirmed.

Pinnell v. Boyd.

CHARLES PINNELL, appellant,

v.

ADONIJAH S. BOYD et al., respondents.



Where the mortgagor and the second mortgagee have a right to set up the defence of usury against the first mortgage, a sheriff, selling the land on foreclosure of the second mortgage, does not, by conveying *subject* to the first mortgage, deprive the purchaser of the right to set up the same defence. The sheriff has no power to waive the usury.

On appeal from a decree advised by the vice-chancellor, and reported in *Pinnell v. Boyd*, 6 *Stew. Eq.* 190.

Mr. S. B. Ransom, for appellant.

I. The appellant, Adonijah S. Boyd, the defendant below, was a second mortgagee. He foreclosed his mortgage, to pay which the premises were sold by the sheriff of the county of Hudson. The respondent, the complainant below, was not made a party in that suit. Boyd purchased the premises under his own foreclosure sale. So he not only acquired title under a foreclosure of a mortgage subsequent to that of the respondent, but he was the mortgagee who held the mortgage under which he acquired his title.

It is not alleged or pretended in the bill that the appellant took his mortgage subject to the lien of the respondent's mortgage. It does not in any way appear that respondent's mortgage was in any way referred to by the mortgagor when he executed the mortgage to Mr. Boyd. *Brolasky v. Miller*, 1 *Stock.* 807.

II. The defendants below, the appellants here, are not, by reason of any averments in the bill and admissions made in their answer, precluded from setting up usury against the complainant's mortgage. *Dolman v. Cook*, 1 *McCart.* 63; *Brolasky v. Miller*, 1 *Stock.* 814; *Conover v. Hobart*, 9 *C. E. Gr.* 123; *Lee v. Stiger*, 3 *Stew. Eq.* 610.

Pinnell v. Boyd.

III. The answer does not admit that Boyd purchased the premises subject to Pinnell's mortgage.

IV. The vice-chancellor says: "Even if it were possible to so read the answer in this case as to be able to say that it did not admit the material fact charged in the bill, still we would be bound to regard the silence of the answer upon this point as an admission of the fact. A material and controlling fact, which is clearly and fully averred in the bill and not denied or alluded to in the answer, must be taken as confessed."

The rule, as stated by the vice-chancellor, is not of universal application. *Scudder v. Van Amburgh*, 4 Edw. Ch. 29; *Gallatin v. Cunningham*, Hopk. Ch. 48; *Mitf.* 215, 216; 2 *Mad.* 322, 323, 324; *Frost v. Beekman*, 1 Johns. Ch. 302; *Murray v. Finister*, 2 Johns. Ch. 157; *Denning v. Smith*, 3 Johns. Ch. 345.

Mr. J. C. Besson, for respondent.

The opinion of the court was delivered by

DIXON, J.

This bill was filed to foreclose a first mortgage upon lands in Hudson county. It alleged that the mortgagor had given a second mortgage to A. S. Boyd, on the same premises; that Boyd had foreclosed his mortgage, and that on his foreclosure, the sheriff had sold and conveyed the premises in fee, to Boyd, and then charged that said premises were sold to Boyd with full notice of complainant's mortgage, and subject to the lien thereof. The defendant, Boyd, answered, admitting the complainant's mortgage, his own subsequent mortgage, his foreclosure, and the sale to himself, as stated in complainant's bill, and then, with requisite particularity, set up usury, in the complainant's mortgage, to the amount of \$200. The proofs fully establish the usury as alleged; but the vice-chancellor refused to give effect to such defence, because of the averment in the bill, undenied in the answer, that the property was sold on the prior foreclosure, *subject* to complainant's mortgage. From the decree thereupon

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made, Boyd appeals, and thus is presented the question for decision.

The principles governing the case have been already settled in this court.

The defence of usury in a mortgage may be set up by the mortgagor, or by any one claiming under and in privity with him, as, for example, by subsequent mortgagees, or by purchasers at sheriff's sale. *Brolasky v. Miller*, 1 Stock. 807.

But the mortgagor may waive the usury, and then those holding under him, by subsequent conveyance, cannot avail themselves of the defence; likewise, one who has acquired from the mortgagor the right to plead the usury, may also remove the taint as to himself, and those thereafter deriving title from him. *Warwick v. Dawes*, 11 C. E. Gr. 548.

From these principles, it follows that Boyd possesses the right to reduce the complainant's mortgage for usury, both in his capacity as mortgagee and as purchaser at sheriff's sale, unless the mere averment that at such sale the property was sold subject to the complainant's mortgage, shows a defeasance of the right.

It has been held that if the mortgagor convey the property by deed, expressly subject to the amount of the existing mortgage, the grantee cannot set up the usury, for such language imports a waiver. But no case is cited to the effect that a sheriff, selling lands under a *fi. fa.* against the mortgagor, to satisfy a subsequent mortgage which itself preserved the defence, has any power so to purge the taint. And, plainly, he can have none. His duty is to sell the property, in the interest of the defendant and the second mortgagee, for the best price it will bring, and obviously, he would be defeating this aim, if he should impose conditions preventing the purchaser from asserting the rights concerning the land, which these parties possess. He has no power to do so. His sale and conveyance transfer to the purchaser the same right to allege the usury in the previous mortgage as they whose estate he conveys, had, and though he declare, at his auction and in his deed, that he sells subject to the prior encumbrance, such assertion cannot create a waiver of the right to plead the usury; it is

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a mere notice, which he may fairly give, to apprise persons of what claims may be made against the title he conveys.

We conclude, therefore, that the bill does not state any facts from which the waiver of the defence for usury is the legitimate inference, and that consequently the decree below should be reversed.

For reversal—BEASLEY, C. J., DEPUE, DIXON, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN—12.

For affirmance—DODD—1.

MARQUIS D. L. GAINES et al.

v.

THE GREEN POND IRON MINING COMPANY et al.

1. The life tenant has a right to use a mine for his own profit where the owner of the fee, in his lifetime, opened it, even though he may have discontinued work upon it for a long period of years. A mere cessation of work, for however long a period, will not defeat the life tenant's right, but an abandonment for a day, with an executed intention to devote the land to some other use, will be fatal to the claim of the life estate.

2. New shafts may be sunk upon veins of ore which had been opened.

On appeal from a decree of the chancellor, reported in *Gaines v. Green Pond Mining Co.*, 5 Stew. Eq. 86.

Mr. Barker Gummere, for appellants.

Two main questions of fact arise upon the pleadings and proofs, to wit :

I. Is it proved that Charles Montrose Graham 3d and Cornelia Ludlow were lawfully married?

Grimm v. Grimm & Iron Mining Co.

II. Is it proved that Robert Ludlow Graham, one of the complainants, is the lawful issue of that marriage?

Mr. Gummere discussed the evidence as to

- a. Courtship.
- b. The marriage.
- c. The certificate and registry.
- d. The situation after marriage.

III. Is Robert Ludlow, calling himself Graham, proved to be lawfully begotten by Charles M. Graham?

- (a) Preparations for the birth.
- (b) Alleged baptism of child.
- (c) Recognition by family.

Long cohabitation between a man and woman, and repeated formal recognitions by them, are evidence of their marriage.

Wilson v. Hill, 2 Beas. 145.

Long cohabitation and general reputation during the period of such cohabitation, are evidence of marriage. *Young v. Foster*, 14 N. H. 114.

But I deny that any case has ever held that where the parties have never cohabited, and the alleged husband, up to the time of his death, denied the alleged marriage, and where the husband's father also denied the marriage up to the time of the alleged husband's death, that the subsequent recognitions of such father are evidence of marriage.

IV. Alleged waste.

So long as the land is fairly used for the purposes to which it was dedicated by the ancestor or donor, no waste is committed. But when the use is one which is inconsistent with such dedication, it is waste, provided such use does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. 1 Wash. Real Prop. *108, and note 1; *Stoughton v. Leigh*, 1 Taunt. 402, 409; *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Conn. 460; *Reed v. Reed*, 1 C. E. Gr. 248; *Bagot v. Bagot*, 32 Beav. 509; *Elias v. Snowdon Slate Co.*, L. R. (4 App. Cas.) 454.

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In America, the law of waste has been modified to suit the circumstances of a new and growing country. *Finlay v. Smith*, 6 *Munf.* 134; *Neel v. Neel*, 19 *Pa. St.* 323; *Irwin v. Covode*, 24 *Pa. St.* 162; *Westmoreland Coal Co.'s Appeal*, 85 *Pa. St.* 344.

That the new opening, made by the Green Pond Iron Company, on the same vein opened by Dr. Graham, was not an opening of new mines, is too strongly fixed by authority to be questioned. When opened, the vein became a mine, and our new openings are workings of the same mine. *Findlay v. Smith*, *ubi supra*; *Elias v. Snowdon Slate Co.*, *ubi supra*; *Croach v. Puryear*, 1 *Rand.* 258; *Clavering v. Clavering*, 2 *P. Wms.* 388.

Mr. Henry C. Pitney, for appellants.

I. As to the titles of the complainants.

(a) The burthen is on the complainants to show their title to the premises, and this depends, confessedly, on the legitimacy of Robert L. Graham.

(b) In making out his legitimacy, the kind of evidence which is ordinarily relied upon in such cases, viz., the cohabitation as man and wife of his mother and her alleged husband, and the acknowledgment of the marriage relation by the latter, is entirely lacking. There is no pretence of any such cohabitation or acknowledgment. On the contrary, the entire absence of it is affirmatively shown.

(c) The production of a marriage certificate, in which occurs the name of a person somewhat similar to that of the alleged husband, is of itself insufficient. The residence named in the certificate, being different from that of the alleged husband, destroys all value of the certificate as such, and increases the burthen of proving the identity of the alleged husband with the male person who went through the ceremony.

(d) There is not the least proof in the case of the identity of the alleged husband with the person who went through the ceremony, except that of the mother and the alleged wife. All that the clergyman proves is, that there was such a ceremony.

(e) The mother and alleged wife is shown to be entirely unworthy of credit, and is contradicted in several instances.

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(f) The partial recognition of the legitimacy of the claimant by the grandmother and grandfather many years afterwards, when both had fallen into senility, is not sufficient to help out complainants' case. The rights of the true heir, Edward Ennis Graham, of North Carolina, the brother of Dr. Graham, who survived his grandnephew of the same name, cannot be defeated by such evidence.

II. There is no waste.

The facts are that the land in question is very rough and mountainous, with a very thin covering of wood and timber, almost all of it entirely unfit for cultivation, and on it is a very large deposit of iron ore, known for years as the "Copperas Mine."

The estate for life of Mrs. Bell resembles the estate by the curtesy of England, and it was always doubted whether, at the common law, and before the statutes of Marlbridge and Gloucester, tenant by the curtesy was impeachable for waste. 2 *Coke Inst.* 301; *Bro. Abr., Waste*, 88; 2 *Christ. Black.* 283, note.

By the strict rule of the common law, the opening and working of an unopened mine, by a tenant for years, was undoubtedly waste.

The language everywhere used was "open" and "opened" to describe a mine which tenant for life might work. 7 *Bac. Abr.* 254; 1 *Cruise* 118; 2 *Bouv. L. D.* 645; *Saunders's Case*, 5 *Coke R.* 12; 1 *Co. Litt.* 54 b; *Com. Dig. Waste*, D. 4.

Chancellor Kent (4 *Comm.* 76) says: "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country."

And see the language of the judges in *Jackson v. Brownson*, 7 *Johns.* 227; *Hastings v. Crunckleton*, 3 *Yeates* 261; 1 *Scribner on Dower* 200, §§ 21-24; Cabell, J., in *Findlay v. Smith*, 6 *Munf.* 134; *Ballentine v. Poyner*, 2 *Hayw.* 110; *Stoughton v. Leigh*, 1 *Taunt.* 402; *Coates v. Cheever*, 1 *Cow.* 460; *Neel v. Neel*, 19 *Pa. St.* 323; *Irwin v. Covode*, 24 *Pa. St.* 162; *Billings v. Taylor*, 10 *Pick.* 460; *Reed v. Reed*, 1 *C. E. Gr.*

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348, 250; *Viner v. Vaughan*, 2 Beav. 466; *Bagot v. Bagot*, 32 Beav. 509, 9 Jur. (N. S.) 1022; *Elias v. Griffith*, L. R. (8 Ch. Div.) 521; S. C., sub nom. *Elias v. Snowdon Slate Quarries*, L. R. (4 App. Cas.) 454.

The opinion of the court was delivered by

VAN SYCKEL, J.

The bill in this cause was filed by the complainants as owners of the remainder in fee of a large tract of wild lands in the county of Morris, to restrain the defendants, who, it is alleged, have only a life estate in said lands, from cutting timber and working the iron mines on said premises, and also praying for an account.

Two principal questions are raised by the defendant's answer: First, whether Robert L. Graham, through whom the complainants derive their title, was the legitimate son of Charles M. Graham, the third. Second, whether, if Robert's legitimacy is established, the working of the mines by the life tenants, under the circumstances shown in this case, is waste.

The complainants allege that Charles M. Graham was married clandestinely to Cornelia Ludlow in July, 1847, and they admit that it was not followed by open cohabitation. Under such circumstances the law will cast upon the complainants the burden of proving the fact of marriage by very clear and persuasive evidence.

It is not deemed necessary to discuss the testimony on this branch of the case; it is sufficient to say that a careful consideration of it has left no doubt in my mind that the chancellor is justified in the conclusion he reached upon this point.

The complainants, therefore, as owners of the remainder in fee, are entitled to protect their estate against waste by the life tenant, or those claiming under her.

The land in question is very rough and mountainous, and almost all of it unfit for cultivation. On it there is a thin covering of wood and timber, with a large deposit of valuable iron ore underlying it. About the year 1812, Dr. Graham, then

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mines on an estate of which her husband had died seized. The mine had been opened and wrought, but had ceased to be worked long prior to the husband's death. The question was whether the widow, in virtue of her estate in dower, was entitled to work the abandoned mine for her own benefit.

The judges answered that the widow was dowable of all the mines which had been opened and worked in her husband's lifetime, and "that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband, in his lifetime, or by those claiming under him, since his death."

In *Viner v. Vaughan*, 2 Beav. 466, Lord Langdale said :

"A tenant for life has no right to take the substance of the estate by opening mines or clay-pits; but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it, and for this reason that the author of the gift has made them part of the profits of the land."

A temporary injunction was granted, so that the right of the life tenant to work the clay pits might be passed upon. That this case did not receive a thorough consideration, is shown by the fact that *Stoughton v. Leigh* was not referred to.

This subject was carefully considered by Lord Romilly, in *Bagot v. Bagot*, 32 Beav. 509, where he says :

"With respect to the abandoned, or, as they are called in the pleadings and evidence, the dormant mines, I am of opinion that it has not been shown that he committed waste in working those mines. It is always a question of degree to be established by evidence, whether the working of a mine which has been formerly worked, is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months, or two years, previously to the tenant for life coming into possession, must still be considered an open mine. A mine which has not been worked for one hundred years cannot, I think, be properly so treated. My present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working, might, without committing waste, be worked again by a succeeding tenant for life. But, if the working of the mine had been abandoned by the owner of the inheritance many years previously, with a view to some advantage which he considered would accompany such discontinuance, apart from the profits to be made from

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the sale of the mineral, I doubt whether a succeeding tenant for life could properly treat that as an open mine."

In *Elias v. Griffith, L. R., (4 App. Cas.) 465*, Lord Selborne says:

"Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry which a tenant for life, or other owner of an estate impeachable for waste, may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt if a mine or quarry has been worked for commercial profit, that must, ordinarily, be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (e. g., for the purpose of fuel or repair to some particular tenements), that would not alone give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. None of the dicta which are to be found in some of the more modern cases (each of which turned upon its own particular circumstances) can have been intended to introduce a condition or qualification not previously known, into the law of mines.

"The other observation which I desire to make is, that when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or quarry; and for this, authority is to be found in the cases which were cited at the bar, of *Clavering v. Clavering*, *Bagot v. Bagot*, and *Lord Cowley v. Wellesley*."

In *Elias v. Griffith, L. R. (8 Ch. Div.) 521*, Lord Cotton remarked that

"To enable a termor, or tenant for life punishable for waste, to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor."

The case of *Clavering v. Clavering, 2 P. Wms. 388*, which gives the right of the life tenant to open new pits or shafts

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for the working of an old vein of coal, has never been overruled in the English courts.

These citations show that, in England, the life tenant has a right to use a mine for his own profit, where the owner of the fee, in his lifetime has opened it, even though he may have discontinued working upon it for a long period of years.

The rule by which the right of the life tenant is to be tested is not the length of time that may have elapsed since the last working of the mines, but it depends upon whether the owner of the fee merely discontinued the work for want of capital, or because it did not prove profitable, or for any other like reason, or whether he abandoned it with an executed intention to devote the land to some other use.

A mere cessation of work, for however long a period, will not defeat the life tenant's right, but an abandonment for a day, with a view, in the language of Lord Romilly, "to some advantage to the property, which the fee owner considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral," would extinguish any claim on the part of the life tenant. If the fee owner should sink a shaft, and afterwards erect a dwelling-house over it, or if he should fill it up and devote the space to agricultural purposes, it would indicate, so clearly, his intention to devote his estate to other uses than mining, that the life tenant could not base any right upon the prior opening.

The distinction between mere cessation of use and such an abandonment as has been adverted to, is recognized in the cases in this country.

In the New York supreme court, a widow was held to be dowerable of a bed ~~chamber~~, although the openings which had been made by the husband had been partly filled up and the work discontinued in his lifetime. *Coates v. Cheever*, 1 Cow. 460.

Chief Justice Shaw, in *Billings v. Taylor*, 10 Pick. 460, expresses the like view:

"Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used during the lifetime of the husband, and it

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makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death, by the heir or his assignee."

Stoughton v. Leigh, *Coates v. Cheerer* and *Billings v. Taylor*, are cited with approbation by Chancellor Green, in *Reed v. Reed*, 1 C. E. Gr. 248.

The American cases have modified the law of waste, to adapt it to the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and undeveloped lands. *Hastings v. Crunckleton*, 3 Yeates 261; *Findlay v. Smith*, 6 Munf. 134; *Ballentine v. Poyner*, 2 Hayw. 110; *Neel v. Neel*, 7 Harris 323; *Irwin v. Covode*, 12 Harris 162.

In *Neel v. Neel*, a coal mine had been opened and worked for family use, and for the benefit of the neighbors, but a very inconsiderable quantity had been taken out. In that case, Judge Lowrie said :

"It seems, in this case, that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines &c., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and, if necessary to the proper working of them, to make new openings in the ground."

In support of these views he cites the English and American cases, and expresses himself without reference to the statute of 1848.

Chancellor Kent says :

"The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country." 4 Comm. 76.

The cases referred to will show a strong inclination to amplify the privileges of the life tenant.

— like this, where there are such vast bodies of

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hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction.

The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored.

When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose, has some support in the adjudications in this country, and is certainly not without reason to uphold it.

To maintain the right of the appellant in this case, it is not necessary to broaden the rule to that extent.

The openings in this case were such as, under the English cases, will establish the right in the life estate to pursue the workings upon the veins which had been opened.

It is sufficient to show that openings were made and ore taken out with a view to profit, and it is wholly immaterial whether the ore was used in the manufacture of copperas or for some other commercial purpose.

The evidence shows a mere cessation of the work, not such an abandonment, in the legal sense of that term, as will defeat the right of the life tenant. The length of time during which cessation continued is immaterial, so long as the fact of abandonment is not established.

The decree of the chancellor, so far as it denies the right of the appellants to work the veins of ore upon which the openings had been made in the lifetime of the owner of the fee, and so far as it enjoins such work, should be reversed, and in other respects affirmed.

Decree unanimously reversed.

Bacon v. Bonham.

JOHN S. BACON, appellant,

v.

BELFORD M. BONHAM et al., respondents.

1. A court of equity will give effect to an assignment of an expected legacy executed in the lifetime of the testator, if made for a valuable consideration.

2. In such case, absence of fraud, good consideration and adequacy of price, should be proved, affirmatively, by the party claiming the benefit of the assignment.

On appeal from a decree of the chancellor, reported in *Bacon v. Bonham*, 12 C. E. Gr. 209.

Mr. W. E. Potter, for appellant.

I. The deed put in evidence by the appellee, purporting to grant, convey and assign a legacy expected by Belford M. Bonham, under and by virtue of the will of John Bonham, having been executed during the lifetime of the said testator, is void as a conveyance or mortgage, both at law and in equity, and passed no rights in and to the legacy therein mentioned to the respondent, Elisha Bonham.

(a) Because it purports to assign or mortgage a naked possibility.

(b) Because the assignment of a possibility or expected legacy, during the lifetime of the testator, is against public policy. *Boydton v. Hubbard*, 7 Mass. 112.

II. Said deed being void *ab initio*, as to said pretended assignment or mortgage, no alleged possession under it could alter its force or strengthen the title of the assignee therein named.

III. There is no proof in the case of possession under said assignment.

Mr. J. J. Reeves and *Mr. A. Browning*, for respondents.

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The opinion of the court was delivered by

PARKER, J.

The appellant, who was complainant in the court of chancery, was a judgment creditor of Belford M. Bonham.

He filed his bill against Belford M. Bonham and Elisha Bonham. Elisha was made a defendant individually, and also as executor of Jehu Bonham, deceased.

The prayer of the bill is for a decree, subjecting the proceeds of a legacy given to Belford M. Bonham by the will of Jehu Bonham, and alleged to be in the hands of Elisha Bonham, to the payment of the judgments held by the complainant against Belford.

Jehu Bonham executed his last will on the 16th day of December, A. D. 1869, and died on the 25th day of March, A. D. 1875.

The will directed Elisha Bonham, the executor therein named, to sell all the property and put the money at interest.

The interest was to be paid to the widow of the testator during her life, and at her death, one-third of the estate was to go to Belford. She died before the testator. It is this legacy which the appellant seeks to have applied to the payment of his judgments.

The judgments were obtained before the will took effect. The executions issued thereon were returned "wholly unsatisfied, no property having been found whereon to levy."

The claim of the appellant was resisted by Elisha Bonham, on the ground that before the filing of complainant's bill, the legacy given Belford by the will, had been assigned to him by Belford, for a valuable consideration.

The testimony proves that after the execution of the will and before the death of the testator, both Belford and Elisha knew its contents.

The testator had told Belford what disposition he had made of his property. Soon after the execution of the will, the testator became hopelessly insane. Upon inquisition had, he was found to be a lunatic, and Elisha having been appointed his

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guardian, the will, with his other papers, came into possession of Elisha before testator's death.

Under these circumstances, Elisha loaned and advanced to Belford, in the lifetime of testator, the sum of \$2,000, and took from Belford an assignment, to that extent, of his interest in the expected legacy. This assignment was executed by Belford on the 27th day of March, A. D. 1874.

After reciting the clause of the will in which the legacy is given to Belford, the assignment purports, for the consideration of \$2,000, to transfer to Elisha all the right of Belford in the estate and prospective estate of Jehu Bonham, which he has, or will have, to the amount of \$2,000 and interest thereon.

That Belford received the \$2,000 from Elisha, at or before the execution of the assignment, is not questioned.

No fraud is alleged in the bill, nor is there any attempt to prove fraud, nor even inadequate consideration. In fact, it appears from the evidence, affirmatively, that there was no fraud in the transaction, and also that the proceeds of the legacy given to Belford by the will, did not amount to \$2,000.

The assignment was given to the attorney of the parties, with directions to have it recorded after testator's death. After his death and before the filing of the bill by complainant, Belford directed the recording of the assignment, which was at once done.

The contention of the appellant is, that the assignment is not valid, because the legacy it purports to transfer was, at the time, a mere expectancy, and not the subject of assignment, and this is the question for decision in this cause.

Courts of equity give effect to assignments of contingent interests and expectancies. A contingent legacy may become the subject of assignment or contract of sale.

Even a naked possibility, or expectancy of an heir to his ancestor's estate, may become the subject of a contract of sale, if made *bona fide* for a valuable consideration, and will be enforced in equity after the death of the ancestor. 2 *Story's Eq. Jur.*, § 1040 ; see, also, note in 2 *Story's Eq.* under § 1040 ; *Spence's Eq. Jur.* § 852 &c.

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It is incumbent upon the party dealing with the heir, or expectant, to show affirmatively that there was no fraud, and that an adequate consideration was paid. *1 Story's Eq. Jur.* § 336.

A deed of assignment of oil, head-matter &c., which *might* be caught and brought home in a certain ship, was held valid in equity as to the future cargo, and if, after the return of the ship, the master delivered the cargo to the assignee, his title could not be defeated by a judgment creditor of the assignor who took the cargo under an execution. *Langton v. Horton*, 1 *Hare* 549.

An assignment, for a valuable consideration, of demands having no actual existence, but which rest in expectancy merely, is valid in equity as an agreement, and takes effect as an assignment, where the demands intended to be assigned are subsequently brought into existence. *Field v. Mayor of N. Y.*, 2 *Seld.* 179.

In a possibility which the parties to the agreement expected would, and which afterwards did, in fact, ripen into an actual reality, an equitable title vests in the assignee. *Ib.*

In *Cook v. Field*, 15 *Q. B.* 460, it was held that an agreement in writing reciting that A was expecting to become seized in fee of an estate, on the death of S., as devisee under her will and contracting to sell all the possibility and expectancy of A in the estate, was not illegal nor contravening public policy.

Under authority of the cases cited, the right of Elisha Bonham, by means of the assignment to him of the proceeds of the expected legacy given to Belford Bonham, was perfect at the time of filing the bill in this cause. A valuable consideration had been paid by him; it appears, affirmatively, that there was no fraud, the testator was dead, the proceeds of the legacy had been reduced to the possession of the assignee; and further, it is proved that after the death of the testator, the precedent contract of assignment was confirmed by the assignor, in directing the paper recorded.

Where, after a contemplated event occurs, the party affirms the precedent contract, courts of equity will hold it binding. *1 Story's Eq. Jur.* § 345.

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The decree of the chancellor dismissing the bill is affirmed, with costs.

Decree unanimously affirmed.

WILLIAM J. POULSON and ISRAEL POULSON, administrators
&c., appellants,

v.

THE NATIONAL BANK OF FRENCHTOWN et al., respondents.

Any person interested in an estate as creditor, or otherwise, has a right to file exceptions in the orphans court to the account of a discharged or removed administrator.

On appeal from a decree of the ordinary, reported in *Poulson v. Nat. Bk. of Frenchtown*, 6 Stew. Eq. 250.

Messrs. J. G. Shipman & Son, for appellants.

I. The appellants insist that the respondents, as alleged creditors of the said Samuel B. Hudnut, deceased, had no right, by the statute, to except to the accounts of the removed administrators, that no one but the new administrators could do that, and that the ordinary erred in holding that the respondents had the right to file the exceptions, and that the decree of the orphans court of the county of Hunterdon refusing to strike out the exceptions filed by the said respondents, severally, was right. *McDonald v. O'Connell*, 10 Vr. 318; Rev. 781 §§ 129, 130.

II. There was no proof that the respondents were creditors, and no proof could be offered to the court that they were creditors. The appellants denied that they were creditors. They alleged that they were not indebted to the Northampton County Savings Bank at all, but insisted that that institution was indebted to them, and they wanted to contest their claim, and they further insisted that to allow an alleged creditor to come in and

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stand on the record as a creditor, and contest the appellant's account, would be conclusive evidence that it was a creditor, and the appellants would not be able to contradict the record.

Messrs. J. T. Bird, J. N. Voorhees and E. R. Bullock, for respondents.

I. The appellants are administrators of Samuel B. Hudnut, deceased. They were removed from office by the orphans court of the county of Hunterdon, and directed by said court to file an account. Having done so, the respondents, as creditors of said Hudnut, filed exceptions to it, and the question presented is, whether the creditors of, or other persons interested in, an estate, may file exceptions to the account of a removed or discharged executor, or whether this right of exception is confined to the newly appointed administrator.

The statute (*Rev. 775 § 105*) expressly states that "any person interested in the settlement of the account of any executor, administrator &c., may, by himself or his attorney, make exception to said account."

Also section one hundred and six, same page, confers same power on the court. *Rev. 771, § 86; 2 Wms. on Exrs. 1775, 1776, 1778; Schenck v. Schenck, Pen. 562; Davidson v. Davidson, 2 Harr. 169; Rogers v. Rogers, 3 Wend. 505; Hawley v. James, 5 Paige 318.*

The opinion of the court was delivered by

PARKER, J.

This is an appeal from a decree of the ordinary affirming a decree of the orphans court of the county of Hunterdon.

The appellants were administrators of Samuel B. Hudnut, deceased. On the 21st day of January, A. D. 1878, an order was made by the orphans court discharging said administrators and directing them to account. On the 28th day of the same month, Edward P. Conklin was appointed administrator in the place of appellants.

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Subsequently, the appellants filed their account, and the respondents, claiming to be creditors of the estate, filed exceptions thereto. The appellants then moved the orphans court to strike out the exceptions upon two grounds.

First. Because it did not appear that the exceptants were creditors of the estate. And

Secondly. Because, if creditors, they had no legal right to except to the account of removed or discharged administrators.

The orphans court refused to strike out the exceptions. Thereupon an appeal was taken to the prerogative court, where the decree of the orphans court was affirmed.

In the exceptions filed by the respondents, they claimed to be creditors. If, upon investigation, it had appeared that they were not creditors, and not interested in the estate, their right to intermeddle, would doubtless have been denied by the orphans court, and the exceptions dismissed.

But, by at once appealing from the order refusing to strike out the exceptions, the appellants prevented inquiry into that question by the orphans court. There cannot be a reversal on this ground.

The second and chief question for decision is, whether creditors have the right to file exceptions to accounts presented to the orphans court for settlement, by discharged or removed administrators. The contention on behalf of the appellants is, that in such case, none but the newly appointed administrator can except.

The one hundred and fifth section of the orphans court act provides that any person interested in the settlement of the account of any executor, administrator, guardian or trustee, may appear and make exceptions. The language of the section is broad, and applies to the case under consideration. No other section of the act limits its application.

It is true that the one hundred and twenty-ninth and one hundred and thirtieth sections of the orphans court act, which provide for the appointment of administrators in place of those discharged or removed, give power to those newly appointed to demand, receive and recover from their predecessors, the prop-

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erty and assets of the estate, and make it the duty of those discharged or removed to settle their accounts and deliver to their successors the property of the estate, and pay over the balance of the money in their hands found to be due upon settlement. But these sections are not inconsistent with the one hundred and fifth section. The object of creditors, in filing exceptions, is not to obtain directly, from discharged or removed administrators, the property or money of the estate in their hands, but to ascertain what property is in their hands, and the true amount of money they should pass over to the newly appointed administrators. To do this, any person interested in the estate may intervene.

In this case, either the present administrator, or the creditor, or both, could file exceptions.

The orphans court did right in refusing to strike out the exceptions filed by respondents.

The decree of the ordinary is affirmed, with costs.

Decree unanimously affirmed.

THEODORE JOHNSON, et al.,

v.

THE BOARD OF COMMISSIONERS OF SOMERVILLE.

Mr. S. B. Ransom, for appellant.

Mr. J. J. Bergen, for respondent.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the Vice-Chancellor in the case below. *6 Stew. Eq. 152.*

COURT OF ERRORS AND APPEALS
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THE MAYOR AND ALDERMEN OF JERSEY CITY, appellants,
v.

HENRY W. GARDNER et al., respondents.

1. Lands condemned by a municipal corporation and in public use for a street before payment of award of damages, will not, at the instance of the owner, be restrained in their use by injunction, where a remedy at law exists, either by ejectment or by suit for the award.
2. Where lands are so taken, and the duty to pay an award therefor, and the right of the owner to be paid, is complete, the owner may maintain an action for the award if the statute directing proceedings for condemnation provide no special mode of enforcing payment.
3. Rights which inhere in the party seeking aid in court, must determine the jurisdiction, and not those of the defendant.

On appeal from a decree of the chancellor, reported in *Gardner v. Jersey City*, 5 *Stew. Eq.* 586.

During the years 1867 and 1868, the corporation of the "Town of Bergen, in the county of Hudson," now represented by the appellants, under the provisions of its charter touching the laying out of public streets, opened within its territory a public street, in extension of Jackson avenue. In doing so, certain lands in said town in the then ownership of George H. Sackett, were taken and condemned as a part of the street so laid out. In these proceedings an award of \$960.76 was made to the owners for the value of the lands and the damages above the assessment for benefits to their other property. These proceedings were ratified by proper authority, and the street was duly established, opened to the public use and a sewer built in it. The lands taken for the street and other lands adjoining, belonging to Sackett, were conveyed to complainants. The award has not been paid to either Sackett or complainants, although demanded by both under the charter, by virtue of which these proceedings

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condemnation were had, payment of the award was directed to be made to the owners by the corporation, and upon such payment being made the title to the lands vested in the city.

Under this state of facts the complainants filed their bill, praying that the appellants be enjoined from the further use of the complainants' lands and of the sewer built therein, unless it pay the complainants the said award and interest within such short time as the chancellor should limit.

The answer admits the essential facts. It sets up certain acts of the complainants subsequent to the condemnation proceedings, which, it avers, work a dedication of the lands to the public as a street, and thereby estops them from setting up any title which they may have against the public use of said lands for a street. Against the complainants' rights to recover the award, the statute of limitations is claimed to be a bar. It denies that the complainants present any ground for relief in a court of equity, and claims that they are afforded an adequate and complete remedy at law.

The chancellor, upon the pleadings and proofs, decreed that unless payment be made by the appellant of the award and interest to complainants, within thirty days from service of a copy of the decree, the city be perpetually enjoined from using, or permitting to be used, the said land for street or sewer purposes.

Mr. A. L. McDermott and Mr. Leon Abbett, for appellants.

I. The facts of this case are stated in the opinion of the chancellor in the suit brought by Gardner and others against Jersey City.

II. The real question at issue between the parties is, whether or not there was a dedication of the land in question for the purposes of a public street. The award was made over six years ago, and if a suit had been brought upon that, the city could have pleaded the statute of limitations, and successfully defended against it. The complainant, however, claims that as the award was not paid to him, there was no legal taking of the land under

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the case of *Mayor &c. of Jersey City v. Fitzpatrick*, 7 Vr. 120, and that he is, therefore, entitled to the relief he prays for in this case under the same case in chancery, 3 Stew. Eq. 97.

III. The city claims that this street was dedicated to public use under the authority of the case of *Clark v. City of Elizabeth*, 11 Vr. 172. The city also calls attention to the case of *State, Kiernan pros. v. Jersey City*, 11 Vr. 483. The city also refers to the case of *Price v. Inhabitants of Plainfield*, 11 Vr. 608, for the purpose of showing that the word "street" written on a map, and the sale of lands by it, operate conclusively as a dedication. In that case it was the dedication of a park by the word being written on the block on a map of said property.

IV. The testimony upon which the city relies to establish the dedication is the following [discussing it].

V. The city claims that the complainants and the owners of the property have, for the last ten or twelve years, assented to the opening of the street, which has existed as an open street all that time; that their only claim since 1868 has been for the award; that they could have brought suit at any time within six years after the award, for the payment of the award; that they abandoned the claim to the land and relied upon the award since 1868; that in 1879, even if they never had done so before, the complainants made a conclusive dedication of the street to the public by the making of the map, selling lands by reference to it, and receiving ten per cent. of the purchase-money on such sales, and that this action of theirs, in connection with the recognition of Jackson avenue in the deed, settles the case as a dedication conclusive upon the complainants; that if a suit had been brought upon the award, the city could have pleaded the statute of limitations; that if a suit had been brought in ejectment, the land taken, the city could have pleaded the dedication successfully, and that an attempt to compel the city to pay the award or surrender the land by a suit in equity, is an attempt to establish a right which does not exist at law in behalf of the complainants.

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Mr. G. Collins, for respondents.

I. The decree was within the power of the court of chancery. *Bonaparte v. Camden and Amboy R. R. Co.*, *Bald.* 205; *Stevens v. P. & N. R. R. Co.*, 5 *C. E. Gr.* 126; *Mettler v. E. & A. R. R. Co.*, 10 *C. E. Gr.* 214; *M. & E. R. R. Co. v. Hudson Tunnel R. R. Co.*, 10 *C. E. Gr.* 384; *Morris Canal &c. Co. v. Jersey City*, 11 *C. E. Gr.* 294; *Pierpont v. Harrisville*, 9 *W. Va.* 215.

II. The suit is barred by no statutory or other limitation. *Loweree v. City of Newark*, 9 *Vr.* 156.

III. There was no dedication. One cannot dedicate what he does not own. *Wash. on Ease.* 186; *Bailey v. Copeland*, *Wright (Ohio)* 150; *United States v. Chicago*, 7 *How.* 185, *Clark v. City of Elizabeth*, 11 *Vr.* 174.

The power of the trustees to sell as they did has been questioned. If they had no power to sell, they had none to dedicate.

The legal title to the land (if the trust deed be void) is vested in them by the general assignment, and they can, at any time, give the required bonds; or, if they refuse, the court of chancery can appoint trustees to succeed them in the interest of the assignors' creditors. *Scull v. Reeves*, 2 *Gr. Ch.* 84; *Alpaugh v. Roberson*, 12 *C. E. Gr.* 96; *Wilt v. Franklin*, 1 *Binn.* 502; *Cunningham v. Freeborn*, 11 *Wend.* 241; *Funk v. Newcomer*, 10 *Md.* 301; *Price v. Parker*, 11 *Iowa* 144; *Rev. p.* 37 § 3.

KNAPP, J.

The principal question presented for consideration is whether a court of equity should entertain jurisdiction of the cause on the facts disclosed in the case.

That courts of equity do not entertain jurisdiction of causes where there exists, at law, a remedy plain, adequate and complete to redress the wrong complained of, stands prominent amongst the rules which serve to define the boundary of jurisdiction between courts of law and courts of equity. The various recognized heads of equity are but a classification of subjects in

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which legal remedies are wanting or afford imperfect and incomplete justice. *Story's Eq. Jur.* § 33.

The rule as applied to the remedy by injunction—the subject in hand—has abundant recognition and support in the decided cases in this state. *M. & E. R. R. Co. v. Pruden*, 5 C. E. Gr. 530; *Higbee v. C. & A. R. R. Co.*, 5 C. E. Gr. 435; *Carlisle v. Cooper*, 6 C. E. Gr. 576; *Stevens v. Erie Railway Co.*, 6 C. E. Gr. 259; *Morris Canal Co. v. Fagan*, 7 C. E. Gr. 430, 436, 437.

The learned chancellor in this case recognizes it in his opinion. Chancellor Zabriskie says, in *Stevens v. Erie Railway Co.*: “Injunctions do sometimes issue to restrain constantly-repeated trespasses, requiring a continued succession of suits, but not where ejectment will restore the complainant to all his rights.”

The controversy usually, in these cases, is not over the existence of such rule, but over the quality and extent of the remedy to be found in the law court, as applied to the case made by the complainant.

The case here is, that lands of the complainants below were taken by the town of Bergen, a corporation now represented by the appellant, for a public street; that they were appropriated to, and continued in, that use by the corporation, without making payment of the compensation lawfully awarded to the owner, when the charter under which such lands were condemned requires payment to be made before the title can vest in the corporation. In other words, that the town took possession of complainants' lands, and still holds them without lawful right or authority.

For such a wrong the action of ejectment generally lies, the result of such remedy being to give to the plaintiff, if successful, the possession of his lands, and, under present procedure, damages for their detention. This gives as ample and complete redress as is within the power of any court to afford a suitor. The chancellor concedes that the complainant had this remedy at will.

In the case of *Fitzpatrick v. Jersey City*, 7 Vr. 120, the supreme court sustained a recovery in ejectment for lands taken

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for the same street, holding that, under the charter of the town of Bergen, the city had neither title to nor right of possession of lands taken for a street until payment of the award therefor was actually made. The case involved the interpretation of provisions contained in the thirty-third section of the charter of 1864, (*P. L. p. 420*).

The section provides for paying or tendering the award for lands to the owner, and enacts that after filing the receipt of the owner &c., "the said lands shall be vested in the town, and the town officers may proceed with said improvement." Some doubt has been thrown on this case by a seeming conflict between it and the decision in this court in *Lehigh Valley R. R. v. McFarlan*, 4 *Stew. Eq.* 706, and the series of cases construing the charter of the Morris Canal Company, which the McFarlan case followed. The sixth section of that charter contains provisions in respect to the title to lands and water required for the canal, closely resembling those found in the Bergen act. In that case, it was held that the provisions for prepayment did not abridge the present right of the company to take and appropriate to its use lands and waters and hold them against the legal owner, although the title to them does not finally vest until compensation be made. And in *Den v. Morris Canal*, 4 *Zab.* 587, ejectment was held not to lie for such lands. It is to be remembered that in the charter of the company express provisions are found, giving authority, after survey filed, to take possession of and use such lands and waters, subject to such compensation as is directed to be made in the act. The charter of Bergen contains no such express provisions. There is room, therefore, for distinguishing between the cases. But whether the same rule may not be applied here, rested upon implied powers in the town charter to take possession, is a question of practical moment, because, among other reasons of the manifest inconvenience and impolicy of making the right to possess and hold property in its streets to depend on mere matter of parol, namely, the fact of paying money, and not upon the recorded proceedings in condemnation, coupled with the open possession and public use of them, and especially so if there exists a right of suit for the award. The legislative

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intent, in the absence of clear expression, to permit public streets paved, sewered and built upon, to be seized by the adjoining landholder because of the neglect of the public agents to perform their duty of payment, may admit of doubt. The point was so little considered in the argument that the question ought not now to be conclusively decided unless the exigencies of this case require it. I think they do not. If the action be maintainable, it affords an ample remedy ; if it be not, then the theory, as will hereafter be noticed, upon which jurisdiction in this case was retained, falls. And whether maintainable or not, the plaintiff in a case like this has, irrespective of it, under our legal methods, a full and ample remedy at law of the nature aimed at by the complainant in this suit. When the conditions have arisen on which it is made the duty of the city to pay, and the right of the owner to be paid, an ascertained amount of compensation, the owner may have a suit at law for its recovery, or, at his instance, payment may be enforced by *mandamus*. And such right of suit is not dependent upon express authority in the act to sue ; it exists if no other statutory mode of obtaining payment is prescribed. So long as there remains in the municipal body condemning lands under the power of eminent domain, the right of withdrawal from the condemnation proceedings, there can be no such right of action, but the liberty to so retire ceases upon the legal adjustment of the amount to be paid, and the acceptance by the public body of the property. *In re Commissioners &c.*, 2 Vr. 73 ; *Mahon v. Freeholders of Hudson*, 10 Vr. 640 ; *O'Neil v. Freeholders of Hudson*, 12 Vr. 161.

Final ascertainment of compensation to the land-owner, and approval of the assessment by the corporation entering upon the possession of the lands and devoting them to the intended public use, show, unequivocally, such an acceptance.

The situation of the complainants, in respect to their right of suit for the award, may be briefly stated thus : The public authorities of the town have, under competent legal right, condemned their lands for a public street ; commissioners have, in the manner prescribed by law, assessed the amount of compensation which the town shall pay and the owner receive ; the town

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authorities have duly approved the award, and have entered upon the possession of the lands and subjected them to the use for which they were condemned. The duty to pay, and the right to be paid, are then complete. Standing upon this ground, there being no prescribed mode under the statute in which payment is to be enforced, the right of suit is complete as upon implied *assumpsit*, upon the established principle that where there exists a duty to pay the law raises a promise to do so.

Judge Dillon says where the owner's right to damage is complete or vested, he may, in proper cases, sue the municipality therefor, or have a *mandamus* to compel it to pay or to proceed to collect the assessment which constitutes the fund from which payment must come. *Dillon on Mun. Corp.* § 479, and cases cited.

The "proper cases" for a suit, as I understand that author, are where no other specific mode of redress is prescribed in the act which directs the improvement.

But this charter goes further, and in express terms commands:

"That upon completing the report of the commissioners of assessment, assessing the value of the lands so taken, and the damages thereby, the city treasurer shall tender and pay to the owner of said lands the amount of such assessment due him."

There is thus created a statutory obligation on the town to pay the sum awarded. To deny this duty is to deny the authority of the statute. Duty to pay money, however, arising, creates civil obligations which courts of law are constantly enforcing by their judgments.

It is contended against the complainants' right of suit for the money awarded, that payment of the money being a condition precedent to the vesting of title in the municipality, no suit will lie, because the lands are not yet taken. It is sufficient to say that the act does not vest the duty to pay the allotted compensation upon any such condition, but, on the contrary, it orders it to be made before the title could, by the terms of the act, vest in the corporation. Upon payment made, whether voluntarily or by force of a judgment, the lands will, for the purposes intended, vest in the corporation.

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The provision deferring the vesting of the legal title until the award be actually paid, was intended to serve the interest of the land-owner, and it would be a perversion of the legislative intent to allow it to operate as an impediment to, or deprivation of his legal right to compensation by suit. The complainants were then armed with a right of action to recover the money awarded them for their lands, with the interest. This legal remedy, without the ejectment, possesses larger efficiency with less inconvenience and expense, than does the alternate decree which the chancellor was able to afford. While the decree restrains the city and the public from the use of the lands for a street, it leaves the owner out of possession. As a decree for the award, payment is optional with the party charged.

The chief ground for claiming jurisdiction in this case is, that the complainant's remedy by ejectment is too large, in that it gives more than a court of equity would, in the interest of defendant's permit the complainants to enjoy. Cognizance is, therefore, taken of this cause, not because of the equitable rights of the complainants who seek that forum, but because of equities of the defendants resting on the contingency of a judgment in ejectment against it.

I think it is a general rule that the character of the rights which inhere in the person seeking redress in court determines the tribunal which he must resort to for their adjudication and enforcement. And as a rule, recourse can be had to a court of equity only when the suitor himself comes, clothed with such rights as give him standing there. Jurisdiction is not gained through the defendant's *status*. Exceptions may exist to the rule, and the common foreclosure proceeding may, in some of its features, indicate such an exception. There, the owner of the legal title has standing in equity because of the wide and well recognized difference between the form of the contract, viz., conveyance in fee defeasable upon a condition subsequent, and that which, within the true intent and meaning of the parties, it was designed to be—a real security for a debt. The mortgagee is let in after default, to have the lands sold to pay his debt immediately, or to call upon the mortgagor to redeem his estate.

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ently, or, in default thereof, forever to be foreclosed from redeeming the same. All the rights of the parties rest in a single contract.

But this case is not exceptional, and whatever equitable rights the defendants may have, whether present or contingent, upon a judgment in ejectment against it, assuming the action to be maintainable, does not afford ground for the transfer of the complainant's clear legal rights to the equity court for adjudication.

The equities of the defendants could not arise for consideration except upon a judgment in ejectment, and in such action it would be the right of the city to be heard in defence. Here the defendants claim that there was a subsequent dedication of the lands. This is a matter *in pais*, determinable upon intent as evidenced by the acts and declarations of the owner. That there was no conclusive act of dedication shown in this case is clear, but that is not a requisite measure of proof, and before the consequences which a judgment in ejectment would force upon the city are to be encountered, it should be permitted to have such defence heard in the law court.

It can scarcely be questioned that the fact of subsequent dedication being found, while it would in no measure affect the vested right of the complainants to be paid their award, would defeat a recovery in the ejectment suit. But further, under the forty-third section of the ejectment act (*Rev. 332*), it would be the right of the defendants, under a suit in ejectment, to pay the amount of the award at any time before, and possibly during the trial, and so defeat the recovery of the lands. The defendants' equities might, therefore, never arise to be enforced.

The plain purpose of this suit was to enforce payment of the damages awarded the complainants by the commissioners, and in justice they ought to be paid by the city, but such payment should, as it may, be enforced where such suits are normally prosecuted.

The jurisdiction cannot be maintained as a measure for the prevention of irreparable injury. All has been done that is proposed by the city to be done. No such injury is imminent or contemplated.

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Nor is the bill maintainable as preventing multiplicity of suits or avoiding circuitry of actions.

Where the court takes hold of a cause under some ground of equity, as for discovery or account, it is within its power to retain the cause and finally dispose of it to avoid multiplicity of suits. So, too, in trespasses of the character mentioned in the case of *Stevens v. Erie Railway*, above referred to. But this case cannot stand in either category.

I deem it unnecessary to consider or decide whether the statute of limitations affecting simple contracts applies to an action on an award for lands made under charter provisions like those of the Bergen act of incorporation, or whether it is to be regarded as a demand upon statute, because, whether applicable or not, could not vary the principles upon which jurisdiction must be decided.

For the reasons above given, I think the suit was wrongly brought in the court of chancery, and the bill should have been dismissed. I shall therefore vote to reverse the decree.

For reversal—BEASLEY, C. J., DEPUE, DIXON, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN—12.

For affirmance—DODD—1.

JOHN T. JOHNSTON

v.

CHARLES G. HYDE.

1. Where the complainant is entitled to an easement of the waters of a natural stream through an artificial raceway, constructed on lands of the defendant, which the defendant has wrongfully interfered with, the court of equity, on final hearing, may, by a mandatory injunction, order the defendant to restore the raceway to its former condition.

2. Where, upon the construction of a deed, it appears to have been the intention of the parties to make a grant of a certain quantity of water

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by an existing dam and raceway on lands of the grantor, the grantee is not bound to use the water in a particular manner, though it be mentioned in the deed that the water privileges were "for the purpose of a saw-mill." He may use the water in a different manner or in a different place, or increase the capacity of the machinery propelled by it, without affecting his rights, provided the quantity used is not increased, and the change does not prejudice the rights of others.

3. Where the grant is of a water-power, and it be left in doubt whether the kind of mill mentioned indicates the quantity of water and measures the extent of the power intended to be granted, or the grant is of water to drive a particular kind of a mill, the former construction will be favored.

4. If the right to an easement of the flow of water has been derived by grant, it may be extinguished by a possession of the servient tenement adverse to the easement for the full period of twenty years, but will not be lost by mere non-user.

5. The owner of an easement may lose his right to it by acquiescence, as where he has discontinued the use of the easement under circumstances indicating his intention to renounce it, and the owner of the servient tenement, relying on his conduct, has been induced to make expenditures in altering and improving his premises, which expenditures would be rendered useless if the owner of the easement should resume the use of it. Under such circumstances in some cases the easement has been considered in equity as extinguished, though the discontinuance of the use of it has been for a period of less than twenty years. Cases of this class depend on the doctrine of equitable estoppel.

6. In 1824, E. was the owner of a saw-mill driven by the waters of a natural stream, diverted from the stream, and carried to his mill by means of a dam and raceway on the lands of D. In May, 1824, E. conveyed to D a moiety of the saw-mill and race, together with the equal half part or moiety of the water privileges and water courses belonging to said saw-mill, "the dam to be raised no higher than it now is, without the consent of the parties, and the said raceway to be and remain as it now stands." On the same day, D. conveyed to E. the equal undivided half part or moiety of the dam and pond situate on his lands, with the one equal moiety of water and water privileges thereto belonging, for the purpose of a saw-mill, "the dam to be raised no higher than it is at this time, without the consent of the parties." In June, 1824, D. conveyed to W. his moiety of the saw-mill and the water-courses, together with the privilege, for the said saw-mill, of the water, dam and race on his lands, "the dam to remain as it now stands * * * and the race, dam and pond to be and remain where it now stands, and not to be altered." In 1835, W. conveyed to E. the moiety of the mill and water privileges he acquired from D. The complainant and defendant, respectively, acquired title under E. and D.—*Held*,

(1) That the grant was of an easement of the right to the flow of so much of the waters of the stream as the dam then standing would divert, and to the use of the raceway as it then was, as the conduit by which the water should be carried to the mill, and also, as incident thereto, the right to cleanse and

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repair the raceway and dam, and to do whatever might be necessary and proper to keep them in a condition fit for the purposes for which they were designed.

(2) That a change in the location of the water-course, and the substitution of a box aqueduct, enclosed and covered over, and of less capacity for the open raceway through the servient tenement, was an injury to the complainant's easement, for which the complainant might have relief in equity.

7. The owner of the dominant tenement has no property or rights in the servient tenement except such as are incident to the enjoyment of his easement. The owner of the servient tenement can do no act on his lands which interferes substantially with the easement, or with those rights which are essential to the full enjoyment of its benefits; but the utmost extent of the duty which rests upon the owner of the servient tenement, is not to alter its condition so as to interfere with the enjoyment of the easement. How far the owner of the servient tenement is interdicted from acts of ownership on his lands will depend upon the nature and qualities of the easement.

8. The chancellor decreed that the complainant was entitled to an easement of an open raceway through the defendant's lands, of a certain width and depth. He ordered that a box aqueduct placed therein should be removed, and the raceway should be restored to its former condition, and that the defendant should be perpetually enjoined from obstructing the complainant in the enjoyment of his easement.—*Held*, in affirming the decree,

(1) That the decree did not interdict the defendant entirely from acts of dominion over the strip of land on which the raceway was located; that the defendant might throw bridges over the raceway to connect the two parcels into which his lands were severed by the raceway, and generally might exercise over the premises such acts of ownership as would not substantially interfere with the complainant's enjoyment of his rights therein; and

(2) That when the defendant shall have obeyed the mandatory part of the decree, whether the acts he shall do in the future are an interference with the complainant's rights, is a question that will arise when the inquiry arises whether the prohibitions of the injunction have been disregarded.

On appeal from the court of chancery.

The parties are owners of adjoining tracts of land through which Green Brook, a natural water-course, flows. On the premises owned by Hyde is a mill driven by the waters of the stream diverted from the natural bed of the stream, and carried to the mill by means of a dam and raceway. The complainant's mill lot contains twelve acres of land, and is part of the premises

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conveyed to him by Mary L. and Sarah L. Hotchkiss, on the 23d of August, 1869. North of his land, the defendant, Johnston, is the owner of the lands through which the raceway extends, up to and including the place where the dam is located. The length of the raceway on the lands of Johnston, from the dam until it reaches the lands of Hyde, is about eleven hundred feet.

In 1872, Johnston substituted for the raceway a wooden box two feet and eight inches wide, and one foot and three inches high, ten hundred and sixty feet in length, and having an effective fall of about five inches. This box was enclosed on the top and filled in on the sides with earth, and covered with soil; and over part of it Johnston constructed a macadamized road from his house to his stable.

In 1874, Hyde entered on Johnston's premises and attempted to raise the gate Johnston had placed at the mouth of the trunk near the dam. Johnston then filed a bill to enjoin Hyde from interfering with the wooden aqueduct. Hyde, after answering the bill, in May, 1875, filed a cross-bill for the purpose of ascertaining and establishing his rights in the premises.

The complainant, Hyde, in his cross-bill, states his right to be of "the easement in the said premises of said Johnston; to have the said pond kept up to the height existing in the year 1824; to have the said dam and raceway maintained in the same manner as then existing; and to have the free and unobstructed use of the said water and the power thereby to be derived, for the said mill, with the right, in addition, of entering upon the said premises upon the banks of the said raceway, and over the same, through its whole length, and to the said pond upon the premises now of the said Johnston, for the purpose of all necessary repairs, and the removal of any obstructions to the free and unobstructed fall and flow of the said water."

The prayer of the cross-bill is, that it may be decreed that the complainant is entitled to the easement of an open raceway through the premises of the defendant, leading from the pond to the mill, and to the maintenance of the pond and dam thereto annexed, so that the water in the said pond may be of the same

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height at which it was on the 8th day of May, 1824; and that the said raceway shall lead said water along the same course, and be of the same depth and width as it then was; and that it may be ascertained and decreed what such average width and depth was and should be, and what should be the height of the water in the said pond; that the said box aqueduct may be decreed to be a nuisance, and may, by the decree of the court, be ordered to be abated and removed, and the said raceway, at the expense of said defendant, be returned to the condition in which it was at the date aforesaid, and that the defendant may be perpetually enjoined from continuing, by means of said box aqueduct, the gate therein, or otherwise, any obstruction to the full and free enjoyment by the complainant of his said easement, or to his coming upon the premises of defendant to repair or clean out said raceway, or abate any nuisance, accidental or otherwise, to his rights in the premises, or prevent any obstruction to his enjoyment of said easement.

The chancellor, upon final hearing upon the pleadings and proofs, dismissed the original bill, and, upon the cross-bill, made a decree that the complainant therein was entitled to the right and easement in the defendant's lands of an open raceway through the same, leading from the pond to the mill of the complainant, and to the maintenance of the said pond, and the dam thereto annexed, so that the water should be kept at the same height that it was on the 8th of May, 1824; that the raceway should lead along the same course, and be of the same depth and width as it then was; and that the average width of the said raceway shall be fourteen feet at the top and nine feet at the bottom, and the average depth four feet; and that the height of the water in said pond should be four feet. The decree further declared that the box aqueduct was unlawful, and directed that it should be abated and removed, and that the raceway should be restored to the condition in which it was in May, 1875, when the cross-bill was filed; and that Johnston and all parties to claim under him be perpetually enjoined from continuing, by means of said box aqueduct, the gate therein, or otherwise, any obstruction to the full and free enjoyment by the said Hyde of

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his said easement, or to his coming upon the premises of the said Johnston to repair or clean out the same, or to abate any nuisance, accidental or otherwise, to his said rights in the premises, or to prevent any obstruction to his enjoyment of said easement. From this decree Johnston has appealed.

Mr. R. W. De Forest and *Mr. B. Williamson*, for appellants.

Mr. J. B. Coward and *Mr. C. Parker*, contra.

The opinion of the court was delivered by

DEPUE, J.

Prior to 1824 there was a mill on the complainant's premises, on the site of the present structure, which was driven by the waters of the stream, diverted therefrom by means of a dam, and conveyed to the mill through an open raceway. The dam and raceway, at that time, were located on or near the site of the dam and raceway as they were when the defendant began his improvements in 1872.

In 1824, Elijah Shotwell was the owner of the mill, and of the tract of land on which it was situate, which then contained forty-one and ninety-three hundredths acres. Next to this tract on the north was a tract of land containing thirty-one and sixty-five hundredths acres, owned by Daniel Shotwell. The dam was on the last-mentioned tract, as was also so much of the raceway as extended to the line of Elijah Shotwell's lands.

Elijah Shotwell acquired title to the tract of forty-one and ninety-three hundredths acres in 1809, by conveyance from Elijah Pound. Daniel Shotwell acquired his title to the tract of thirty-one and sixty-five hundredths acres in 1822, by conveyance from Asa F. Randolph. By a deed bearing date on the 8th day of May, 1824, Elijah Shotwell made a conveyance in fee to Daniel Shotwell, in which the premises conveyed are described as "all that one equal half of a tract or parcel of land and premises, being the one equal half part or moiety of a saw-mill and race, together with the one equal half part or moiety of the

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water privileges and water-courses belonging to said saw-mill, erected on the said Elijah Shotwell, with the privilege of a walk on the race-bank to said saw-mill from the dam that is erected for the said saw-mill as it now stands; the dam to be raised no higher than it now is, without the consent of the parties, and the said race to be and remain as it now stands."

By a deed bearing date on the same 8th day of May, 1824, Daniel Shotwell made a conveyance to Elijah Shotwell of premises described as "all that equal half of a tract or parcel of land and premises, being the one equal, undivided half part or moiety of the dam and pond erected on the said Daniel Shotwell, together with the one equal moiety of the water and water privileges thereunto belonging, situated on Green Brook, for the purpose of a saw-mill erected on the said Elijah Shotwell, as it now stands, the dam to be raised no higher than it is at this time without the consent of the parties."

By these two conveyances of May 8th, 1824, Elijah and Daniel became joint owners of the mill and of the water privileges, including the pond, dam and raceway—each continuing to be the owner in severalty of the adjacent lands. On the 23d of June, 1824, Daniel conveyed his moiety of the mill, with its water privileges, to William B. Shotwell, who in turn, by a deed dated December 10th, 1835, conveyed the same to Elijah, who thus became the owner in severalty of the mill and its water privileges. Elijah was then the owner of the tract of forty-one and ninety-three hundredths acres, which he purchased of Pound in 1809, including the mill, with such water privileges as were granted by the deeds of May 8th, 1824. In the deed from Daniel to William P. Shotwell, made in June, 1824, for his moiety of the mill, there is an express grant of "all the water-courses, together with all the privileges of the race above and the race below, that the said Daniel Shotwell is possessed of, the lands of the said Daniel Shotwell and Nathan Vail, and also the privileges for the said saw-mill, of the water, dam and race on the lands that the said Daniel Shotwell purchased of Asa F. Randolph, * * * and the dam to remain as it now stands, * * * and the race, dam and pond to be and remain where it now stands, and not to be altered."

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The complainant, when this bill was filed, was the owner of twelve acres of the tract of forty-one and ninety-three hundredths acres, including the mill and its water rights, having acquired his title by divers mesne conveyances from Elijah. The defendant is the owner of the residue of the tract of forty-one and ninety-three hundredths acres owned by Elijah in 1824, and also of the tract of thirty-one and sixty-five hundredths acres owned by Daniel at that time. He acquired title to these two tracts in different parcels at several times, by divers mesne conveyances. The dam and about two hundred feet of the race-way are on the tract of thirty-one and sixty-five hundredths acres which was owned by Daniel in 1824. The rest of the race-way, until it reaches the complainant's lands, lies upon that part of the tract of forty-one and ninety-three hundredths acres which defendant owns by a title derived from Elijah.

In view of the claim of right in the bill, and the prayer for relief, I do not deem it necessary to refer to the provisions on this subject contained in the intermediate title deeds of the parties. The case made in the bill, the prayer for relief and the decree of the chancellor are based upon the condition of things in 1824. If the complainant acquired greater rights in parts of the defendant's land by the intermediate deeds of conveyance, such rights are not within the right claimed in his bill or within the prayer for relief.

It should, however, be remarked that, in the claim of title of the parties from Elijah and Daniel Shotwell, the water rights and privileges, as they existed in 1824, are preserved by recitals and reservations contained in the intermediate deeds of conveyance. Indeed, it is not disputed that the complainant acquired, by his deed from the Hotchkisses in 1869, the right to the use of the waters of the stream as they had been used theretofore; nor is the right of the complainant to have the dam and its pondage maintained at their present height denied. The contention of the defendant is, first, that Hyde is not entitled to any relief on his cross-bill, and that, if he has succeeded in the suit, he is only entitled to a dissolution of the injunction granted on the original bill; second, that he has abandoned or lost his ease-

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ment by non-user or by the appropriation of the water to another and a different use from that to which it was limited; third, that he is concluded from the relief sought by the cross-bill by an equitable estoppel arising from his acquiescence in expenditures and improvements made by Johnston; fourth, that if he is entitled to any relief other than a dissolution of the injunction granted upon the original bill, he is only entitled, under the pleadings and proofs, to have the water conveyed from the dam across the lands of Johnston by a viaduct of sufficient capacity to permit the flow of so much water as he is entitled to have from the stream, and that he has no grounds for complaint if such a viaduct has, in fact, been constructed, to be maintained by said Johnston at his own expense. The defendant insists that, as the owner of the servient tenement he may provide for the transmission of the water through his lands in such a manner and by means of such contrivances as may be advantageous to his interest, provided he does not impede the flow or diminish the quantity of the water, if he assumes the burden of constructing and keeping in repair the aqueduct by which that result shall be effected. In the brief of counsel, a commission is asked for to ascertain the necessary facts for a decree of the import just mentioned.

The right of the complainant to the flow of the water, independent of the equitable defences interposed by the defendant, being undisputed, the jurisdiction of a court of equity in the premises is too well settled to be a matter of contention. Under such circumstances, a court of equity may, by preliminary injunction, interpose to prevent the threatened injury, and on final hearing may, by a mandatory injunction, compel the restoration of the premises to the condition in which they were before the complainant's rights were interfered with. In such a case, a mandatory injunction is nothing more than a means of executing the judgment or decree of the court, and is necessary to carry its decree into execution. *Rogers Locomotive Works v. Erie Railway Co.*, 5 C. E. Gr. 379; *Carlisle v. Cooper*, 6 Id. 576; *Belknap v. Trimble*, 3 Paige 577; *Corning v. Troy Iron Co.*,

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40 N. Y. 191; *Kerr on Injunctions* 231; *Coulson & Forbes on Waters* 666.

Before 1824 the mill on the complainant's premises was used as a saw-mill. In the deeds of 1824 the mill is called a saw-mill; and in the deed from Daniel to Elijah the water privileges are described as being "for the purpose of a saw-mill."

In *Luttrell's case*, 4 *Coke* (Vol. 2 part 4) 86, the plaintiff declared that, 4 *Martii*, 40 *Eliz.*, he was seized in fee of two old and ruinous fulling-mills, and that from time immemorial *magna pars aquæ cujusdam rivuli* ran from a place called Head Wear to said mills, and that afterwards he pulled down the said mills and erected two mills to grind corn, and that the defendant broke the bank and diverted the water from his mills. The defendant claimed that the plaintiff, in tearing down the old fulling-mills, and building the new mills, had destroyed his prescription, and could not prescribe for a water-course to the grist-mills. But it was resolved that mill was the substance and thing demanded, and the addition of grist or fulling was but to show the quality of the mill, and that the plaintiff might alter the mill into whatever nature of a mill he pleased, provided no prejudice should arise thereby, either by diverting or stopping the water as it was before. Ever since *Luttrell's case* it has been considered settled law that, when the easement is of a certain quantity of water, the owner is not bound to use it in a particular manner, though the purpose for which it is used be mentioned in the grant. He may use the water in a different manner or at a different place, or increase the capacity of the machinery which is propelled by it, without affecting his right, provided the quantity used is not increased and the change does not prejudice the rights of others. *Saunders v. Neuman*, 1 *B. & Ald.* 258; *Hall v. Oldroyd*, 14 *M. & W.* 789; *Watts v. Kelson*, *L. R.* (6 *Ch.*) 166; *Caster v. Shipman*, 35 *N. Y.* 533; *Carlisle v. Cooper*, 6 *C. E. Gr.* 595.

It is manifest that the grant contained in the deeds of 1824 is a grant of a certain quantity of water. The call for the dam at its then present height, and for the raceway as it then was, makes it apparent that such was the purpose of the parties.

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When the grant is of a water-power, and it be left in doubt whether the kind of mill mentioned indicates the quantity of water, and measures the extent of the power intended to be conveyed, or the grant is of water to drive a particular kind of mill, the former construction will be favored, because it is most favorable to the grantee without being more onerous to the grantor. *Ashley v. Pond*, 18 Pick. 268. Grants referring to the purpose for which the water is to be used in much more specific and precise terms than those now under consideration have been held to be grants of a certain quantity of water for unlimited use as a water-power, and not grants of water to be used for the specified purpose only. *Cromwell v. Seldon*, 3 Comst. 253; *Borst v. Empie*, 1 Seld. 33; *Olmstead v. Loomis*, 5 Id. 423; *Prall v. Lamson*, 2 Allen 275; *Angell on Water-Courses*, § 149 a to 149 h. The mill has at times since 1824 been used for manufacturing purposes of different kinds, and at one time the power needed was obtained by using a steam engine in addition to the water-power. But for none of these uses was more water used or obtained than was supplied by the dam and water-power as it was in 1824.

Nor has the complainant lost his right to the water by a cesser of use. Mere non-user of a prescriptive right will not destroy the right unless there be evidence of an intention to abandon it. *Crossley v. Lightowler*, L. R. (2 Ch.) 478. If the right has been derived by grant, it may be extinguished by possession of the servient tenement adverse to the easement for the full period of twenty years, but will not be lost by mere non-user. *Carlisle v. Cooper*, 4 C. E. Gr. 256; *Stilwell v. Horner*, 6 Vr. 307; *Townshend v. McDonald*, 2 Kerr. 381; *Smyles v. Hasling*, 22 N. Y. 217; *Arnold v. Stevens*, 24 Pick. 106; *Ower v. Field*, 102 Mass. 91-114; *Goddard on Ease*. (Bennett's ed.) 464. The mill has been in general use since 1824. At times the race-way has been dilapidated, and for about one year the mill lay idle, by reason of a disagreement between the complainant and his tenants.

There are cases in which the owner of an easement has been considered as having lost his easement by acquiescence, as where

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he has discontinued the use of the easement under circumstances indicating his intention to renounce it, and the owner of the servient tenement, relying on his conduct, has been induced to make expenditures, in altering and improving his premises, which expenditures would be made useless if the owner of the easement should resume the use of it. Under such circumstances, in some cases, the easement has in equity been considered as extinguished, though the discontinuance of the use of it has been for a period less than twenty years. *Davies v. Marshall*, 10 C. B. (N. S.) 697; *Stokoe v. Singers*, 8 E. & B. 31; *Liggins v. Inge*, 7 Bing. 682; *Morse v. Copeland*, 2 Gray 302; *Raritan Water Power Co. v. Veghte*, 6 C. E. Gr. 463; *Case of the Water-Courses*, 2 Eq. Cas. Abr. 522; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91; *Duke of Devonshire v. Eglin*, 14 Beav. 530; *Haight v. Proprietors*, 4 Wash. C. C. 601; *M. & E. R. R. Co. v. Pruden*, 5 C. E. Gr. 531; 2 Am. Lead. Cas. 579; *Coulson & Forbes on Waters* 208. Cases of this class depend upon the doctrine of an equitable estoppel.

There are no facts in this case upon which it can be held that the complainant's easement has been extinguished by an adverse possession, or that the complainant is concluded from the right to the use of the easement by an equitable estoppel. If the doctrine of equitable estoppel has any application in this case, it will be when we come to consider whether or not the complainant has disentitled himself to any other right than to have the water delivered to him on his premises in the manner in which the defendant has made provision for its delivery.

Having reached the conclusion above indicated, with respect to the equitable defences interposed by the defendant, I turn now to the consideration of the nature and extent of the complainant's rights, and the relief he is entitled to on his cross-bill.

The complainant founds his right to an easement in the defendant's lands upon an express grant. The question is, therefore, one of construction only.

Speaking generally with reference to the subject matter of the grant, it is a grant of a water-course. A grant of a water-course may mean either the easement of the right to the flow of water,

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or it may mean the channel pipe or drain which contains the water, or the land over which it flows; and if the context does not show an intention to make a different grant, it will mean an easement of the right to the flow of the water. *Taylor v. Corp. of St. Helen's*, 6 Ch. Div. 271-7. A grant of "a water-course flowing or descending from a head weir * * in and through a meadow, * * and from thence conveyed by a trough into a meadow," is not a grant of the soil of the channel, but subjects the channel to an easement of the flow of water through the channel. *Doe v. Williams*, 11 Q. B. 688-700. The use of an artificial channel over the lands of another, through which the waters of a natural stream have flowed for the prescriptive period, will give an easement of the right to the flow of the water through that channel, and the right to sue for the interruption of that easement. *Beestone v. Waite*, 5 E. & B. 985-995. In *Wortham v. Hurley*, 1 E. & B. 665, the grant, which was by a deed, was of the waters of a natural stream, to be allowed to flow in a free, uninterrupted course, through a designated channel which had been artificially constructed over the lands of the grantor, with a covenant by the grantee to keep the channel in repair and properly scoured; and it was adjudged that, inasmuch as the channel was specified, and the right was given to enter and clean the channel, the grant operated as a grant of the easement of the water-course therein described, and that a change of the channel on the servient tenement would be an injury to the right. The defendant insisted that the water, though diverted from a part of the channel, was restored to it at a lower spot, so that, in effect, the plaintiff had the full use of the water; but it was the opinion of the court that the deed operated as a grant of the easement of a water-course therein described, and that the grantee acquired a right in respect of that channel such as that a change in the channel was an injury to the right for which he might sue, though he had, in fact, sustained no actual damage.

In *Johnson v. Jacqui*, 10 C. E. Gr.; 11 Id. 321; 12 Id. 552, the owner of the dominant tenement had obtained a grant by deed from the owner of the servient tenement, of the

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right to take the water from a pond of the latter, across his lands, "as now carried in the trunk or feeder that carries the water from said pond to the grist-mill pond" &c. By the widening of a highway the trunk came within the lines of the public road, and the owner of the easement proposed to renew the trunk, and, in part, change its location on the land of the grantor. He was enjoined from making any alteration in the location of the trunk, although the deed expressly granted him the right to enter upon the lands of the grantor "along and adjoining said trunk or feeder, to alter, repair or renew the same at his convenience." This court held that the deed created an easement of an artificial water-way on a defined line over the servient tenement, which could not be changed to other lands of the owner of the servient tenement without his consent. The case cited is an authority for the one in hand, for it was decided in a construction of a deed of grant, which is applicable to both the owner of the easement and the owner of the servient tenement, and it was so considered by Mr. Justice Knapp in his opinion in this court. *12 C. E. Gr.* 555.

The raceway was in existence and in use when the deeds of 1824 were made. So far back as the testimony has gone (upwards of thirty years), the raceway is described as an open raceway. The evidence raises no doubt that it was such in 1824. The deeds of that date are to be construed in reference to the state and condition of the premises at that time. *Hall v. Lund, 1 H. & C.* 676. They establish the height of the dam as it then was, and provide for the maintenance of the raceway as it then stood, with the privilege of a walk on the race-bank from the saw-mill to the dam—"the said race, dam and pond to remain where they now stand, and not to be altered." On the construction of these deeds it is clear that the grant was of an easement of the right to the flow of so much of the water of the stream as the dam then standing would divert, and of the use of the raceway, as it then was, as the conduit by which the water should be carried to the mill. Incident to the rights granted is the right to enter on the lands of the grantor to cleanse and repair the raceway and dam, and to do whatever might be necessary and proper to

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keep them in a condition fit for the purposes for which they were designed. *Pomfret v. Recroft*, 1 Wms. Saund. 323; *Prescott v. Waite*, 21 Pick. 341; *Goddard on Eise.* 285. The easement is a unit, consisting of the right to the flow of water and of the use of the raceway, and the right to enter to scour and repair. *Peter v. Daniel*, 5 C. B. 567; *Coulson & Forbes on Waters* 229.

For this easement the defendant proposes to substitute another and a different easement, consisting of the right to the same flow of water carried over his lands by contrivances devised and constructed by himself, and to be maintained at his own expense—substituting an enclosed and covered culvert, of less capacity, for an open raceway; and his obligation to amend and keep in repair in the place of the right of the owner of the easement to enter and make repairs whensoever they may be necessary. The change is one that materially affects the rights of the owner of the easement, and cannot be made without the consent of the latter.

On this head the defendant contends that the complainant has waived his legal rights by acquiescence in the alterations and improvements made by the defendant. The proof is that the defendant began his improvements in 1872, in which he has expended \$6,000, of which \$1,000 was expended in the construction of the wooden aqueduct. But there is no evidence that the defendant was induced to incur this expenditure on the faith of the abandonment, by the complainant, of his water rights and privileges as they had been enjoyed since 1824. On the contrary, it is quite clear from the evidence that the defendant knew that the complainant insisted on his rights as he had previously enjoyed them, and that he gave no consent to the proposed alterations. Under such circumstances there is no ground on which an equitable estoppel can be rested, or on which he can be compelled to accept an enclosed culvert of the proposed dimensions in the place of an open raceway.

Nor is the complainant concluded from insisting on his right to such a raceway as he is entitled to through the defendant's lands, by the action of the public authorities in laying and opening Farragut avenue over the raceway. In addition to the reasons assigned by the chancellor for considering the condition

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of the raceway under the avenue as no impediment in the way of the relief sought, it may be added that the defendant cannot justify under the action of the public authorities. If the public has infringed on the complainant's rights, he may have his redress against the public authorities, if no compensation has been made to him for the injury suffered.

The chancellor held that the complainant was entitled to an easement of an open raceway through the defendant's lands, along the same course, and of the same width and depth, as it was in 1824. He ascertained its average width to be fourteen feet at the top and nine feet at the bottom, and its average depth to be four feet. He decreed the box aqueduct constructed by the defendant to be unlawful, and ordered that it should be removed, and that the raceway should be restored to its former condition at the defendant's expense, and that the complainant should be protected in the enjoyment of his easement by a perpetual injunction. I think his decree should be affirmed.

Some criticism was made, on the argument, upon the language of that part of the decree which adjudged that the complainant is entitled to "an easement of an open raceway." It was said that the decree gives to the complainant absolute and entire dominion over the strip of land on which the raceway is located, and that the defendant is excluded from all right in that part of his lands. I do not so understand the import and legal effect of the decree.

The decree adjudges that the complainant is entitled to an easement, which, in legal signification, imports an interest in the lands—the ownership of which is in another—an incorporeal hereditament, consisting of the right to use the lands of another for the purposes for which the easement was created, with the privilege of doing on the servient tenement such acts as are essential to the enjoyment of the easement itself. The owner of the land over which the easement extends, so far as the easement is capable of being exercised, is deprived of an incident of property, and the owner of the easement acquires by it, just to the same extent, an interest in the land itself. *Phear on Waters* 58. Considered with regard to the servient tenement, an easement is

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but a change or obligation curtailing the ordinary rights of property (*Gale on Ease.* 6), which remain in the owner of the lands subject to the enjoyment of the easement. *Wash. on Ease.* 227.

The owner of the dominant tenement has no property or rights in the servient tenement except such as are incident to the enjoyment of his easement. So strictly is this principle adhered to, that when the owner of an easement of a water-course exercises the right to cleanse the channel through the servient tenement, his right to remove the materials taken out will depend upon the circumstance whether they are or are not useful or beneficial to the owner of the soil; and if he does remove them, it is his duty to do so in a reasonable time and in a manner least prejudicial to the owner of the land. *Prescott v. White*, 21 *Pick.* 341.

On the other hand, the owner of the servient tenement can do no act on his lands which interferes, substantially, with the easement, or with those rights which are requisite to the full enjoyment of its benefits; but the utmost extent of the duty which rests on the owner of the servient tenement is not to alter its condition so as to interfere with the enjoyment of the easement. *Gale on Ease.* 7. 339. How far the owner of the servient tenement is interdicted from acts of ownership on his lands, will depend on the nature and qualities of the easement. The owner of land over which the grantor has reserved a passage-way "for carrying and recarrying wood and any other thing through the same," may lawfully cover the same with a building, if he leave a space so wide, high and light that the way is substantially as convenient as before, for the purposes for which it was reserved. *Atkins v. Boardman*, 2 *Metc.* 457. But when tenants in common made partition of their lands, except a certain passage-way or court, called Central Court, and covenanted that the part not set off in the partition should "be left, and always lie open for the passage-way or court aforesaid, for the common use and benefit of both the said parties and their respective estates," it was held that the parties had not only a right of way, but also a right to have the whole court open for light and air; and a

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bridge over the court, connecting the buildings on each side, which seriously incommoded the one party, was enjoined. *Salisbury v. Andrews*, 128 Mass. 336.

In one sense an open raceway is essential to the enjoyment of the complainant's rights; but it cannot be imagined that a raceway open *usque ad cœlum*, and throughout the entire length of the raceway, is necessary to that end. The easement of the complainant is of the right to the flow of the water through the channel, with the right to keep up and maintain the banks of the raceway, and to scour and cleanse the same when necessary. The box aqueduct which the defendant placed in the raceway was a plain invasion of the complainant's rights, and the chancellor decreed that it should be removed. The chancellor, also, by an injunction, in general terms, perpetually enjoined the defendant from obstructing the full and free enjoyment by the complainant of his easement, and of his right to cleanse and repair; but he did not determine, in advance, what acts of the defendant in the future would be a violation of the complainant's rights. The defendant may throw bridges over the raceway to connect the two parcels into which his lands are severed by the raceway, in such a manner as not to impair the complainant's rights, and generally may exercise over the premises such acts of ownership as do not substantially interfere with the enjoyment by the complainant of his rights therein. Such acts are the incidents of his title as the owner of his lands, and have not been surrendered to the complainant. Whether the acts he shall do in the future, when he shall have obeyed the mandatory part of the decree, are substantially an interference with the complainant's rights, is a question which will arise when the inquiry arises whether the prohibitions of the injunction have been disregarded.

The decree should be affirmed, with costs.

Decree unanimously affirmed.

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ARCHIBALD K. BROWN, appellant,

v.

JOSEPH M. BROWN et al., respondents.

1. The specific performance of contracts is a mode of redress grounded upon the impracticability or inadequacy of legal remedies to compensate for the damages which the party seeking it will suffer by the default of the other in keeping his bargain.

2. It is only when the remedy at law will not put the party in a situation as beneficial to him as if the agreement were specifically performed that equity will interfere.

3. Where jurisdiction exists, the remedy is not of right; the court holds it in judicial discretion, controlled by principles of equity and justice.

4. The bargain or promise to be enforced, whether written or verbal, must possess, in substance and external form, the requisites of a valid contract.

5. It must have been completely determined between the parties, and its terms definitely ascertained.

6. So long as negotiations are pending over matters regarded by the parties as material to the contract, and until they are settled, and the minds of the contracting parties meet upon them, it is not a contract, although, as to some matters, they may be agreed.

7. Where it was sought to compel the specific performance of a parol agreement to assign in trust, for the benefit of the complainant and five other creditors, the defendant's interest under a will, and it appeared that at the interview during which the alleged parol agreement was entered into, the terms and conditions of the assignment were in a measure, but not entirely, ascertained; it being understood at that time that the assignee was to pay the creditors first, and then reconvey the remainder to the assignor, but as to provision for the defendant's own support out of that interest, and his release and discharge from those creditors' claims no agreement was reached; and afterwards the defendant, using a form drafted for him by the creditors, containing such provision, prepared, signed and sealed an instrument of assignment, and at the instance of one of the creditors omitted therefrom all such provision, but refused to deliver the instrument, on the ground that such provision was first to be made, and the creditors to release and discharge him from their demand—*Held*, that there is no such contract established between the complainants and defendant as a court of equity can and will perform by its decree.

8. In such case there was no delivery of the deed of assignment, and, therefore, the suit cannot be maintained as a proceeding to obtain possession of a deed or muniment of title.

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9. What acts or words shall constitute a delivery must depend upon the circumstances of each case.

10. A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere.

11. The proposal made by the defendant was, as to all the creditors named, an entirety, and was not capable of severance.

12. The failure of a part of the creditors to agree to a condition embracing all would be a total, not a partial, failure to accept such conditions.

13. A devise of rents arising out of the residue of the testator's real estate, which the executors were authorized and directed to sell, is an interest in lands within the statute of frauds, and its transfer must be evidenced by a note or memorandum signed by the party to be charged therewith.

14. In order to enforce the performance of a contract within the statute of frauds, on the ground of part performance, (1) the parol agreement relied on must be certain and definite in its terms; (2) the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; (3) the agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation.

15. The assignment in this case cannot be regarded as the written memorandum required by the statute of frauds, because it was not delivered.

On appeal from chancery.

Mr. Gillmore and *Mr. Collins*, for appellant.

Mr. Weart and *Mr. Ransom*, for respondents.

KNAPP, J.

The bill of the complainants below, and the several cross-bills, were designed in effect to have the appellant specifically perform a parol agreement to assign in trust, for the benefit of complainant and certain other creditors of appellant, his interest in the estate of his father-in-law, Hosea F. Clark, deceased, given by his will.

In the pleadings filed, and from the proofs taken in the cause, it appears that in the year 1877 the appellant, Brown, was indebted to the complainant, and to William M. Force and others for money which he, acting as their attorney, had collected for

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them and failed to pay over. He was without means or resources to satisfy these and other debts owing by him, except the provision made for him in the will of his wife's father.

Force and the complainant were pressing him for payment. Force had instituted, in the Supreme Court, proceedings for attachment and to disbar him, and had commenced suit for his claim. The complainant threatened similar measures against him, and each was urging to have the interest in the will assigned to himself. Brown had promised to make the transfer to Force, but did not do so.

About the month of July, 1877, Brown met Force and his attorney at the office of the complainant's solicitor in Jersey City. At that interview he promised to assign the whole or some part of his interest under the will in trust for the ratable benefit of the complainants, Force, Henry S. Little, Benjamin F. Lee, John S. Beegle, George F. Brown and Joseph M. Brown, all of whom were his creditors, and the terms and conditions of the proposed assignment were in a measure, but not entirely, ascertained. It was understood that what should be assigned must be for the common interest of all the creditors named, and that when they were entirely paid, the remainder should be given back to the assignor. What sum or share, if any, Brown should retain for his own support, or what disposition the creditors were to make of their claims, or what changed attitude towards Brown was to be assumed by them in consideration of the assignment, the parties seem not to be agreed about.

Mr. Ransom drafted a form from which Brown was to prepare an instrument of transfer. This he, Brown, did, omitting at the request of Force, or his attorney, all provision for himself, named John Olendorf, Jr., as trustee, authorized him to collect from the executor of Clark all moneys due or to grow due to him from the estate, and directed payment, as the money should be received, to be made *pro rata* among the creditors named until they were paid their several demands, and the balance to reconvey to him. The deed so drawn was signed and sealed by Brown in the presence of a subscribing witness, but the custody of the paper remained with the appellant. He re-

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fused to hand it over to the assignee or to the creditors who applied for it, upon the alleged ground that some provision was first to be made for some portion of interest under the will for his own support, and that the creditors so to be provided for were to discharge him from their demands and engage to no further prosecute them against him. Those creditors who were active in pressing their demands against him disagreed to his retaining any share of the Clark estate for his maintenance, and one of them, Mr. Force, pressed the suit already commenced against him to final judgment, execution and supplemental proceedings to get possession of his share under the will, and in October, 1877, filed his bill in equity for the appointment of a receiver. Upon the case as made, the leading features of which are thus summarized, the advisory master found that there was an agreement made by Brown on sufficient consideration to assign the interest given him in the will upon the precise terms expressed in the writing signed and sealed by him. And that, although the deed of assignment was not technically delivered to Olendorf, yet the beneficiaries under it had a right to have it delivered and specifically performed; that Force was entitled to participate in the subject of the assignment, and he advised a decree accordingly. Such decree was entered, and the appeal is taken from the decree.

Before proceeding to those questions which I regard as controlling the cause, it is proper to notice a point urged by counsel of appellees with much earnestness, viz., that the deed of assignment was delivered, or should be so regarded in a court of equity. Until a deed is delivered it has no force or validity. What acts or words shall constitute a delivery must depend upon the circumstances of each case. Words or acts which evince an intent to deliver, such intent having reference to the present time, are sufficient. *Folly v. Vantuyl*, 4 Hal. 153.

The possession by the grantee of a deed formally executed is presumptive evidence of delivery. The admissions of the grantor of a delivery are, like other admissions against himself, competent evidence upon the subject. But it is a fact to be proved, like any other, by competent testimony; and whether the

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issue be in a court of law or in equity, it is one to be established by proof, and we are not aware of any rule of evidence under which the character or measure of proof of a fact differs in the different jurisdictions. Certainly, neither in law or equity, has the court power to take up a contract unfinished between the parties, and complete it for them by its judgment or decree. Courts do not make contracts for parties. We agree entirely with the advisory master that no delivery was proved. When the instrument was sealed, the grantor expressly declared his intention to retain it for further consideration. If there was a delivery, the title to the fund would have passed to the assignee, and it would then be difficult to find standing-ground for the appellees; this suit would be a purposeless proceeding. If there was no delivery, the suit cannot be maintained as a proceeding to obtain possession of a deed or muniment of title. Title in the plaintiff to the document sought to be recovered is essential in such a suit.

The decree, although in form directing the delivery of the specific paper drawn and signed by appellant, is, in substance, as we interpret it, one for the specific performance of the parol agreement to assign the appellant's share under the will, by executing an assignment according to the terms of the agreement as found by the court.

The question, then, raised by the appeal is, whether the complainants below have established such a contract between the appellant and themselves as a court of equity can and will perform by its decree.

There are certain general rules governing the court in the specific execution of contracts between parties that are established. It is a mode of redress, grounded upon the impracticability or inadequacy of legal remedies to compensate for the damages which the party seeking it will suffer, by the default of the other in keeping his bargain. Where the law gives an action for the non-performance of the contract, and damages can be admeasured to fully match the wrong inflicted, courts of equity will not, unless other grounds of equitable relief be involved, accord this remedy. It is only when the remedy at law will not put the

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party in a situation as beneficial to him as if the agreement were specifically performed. *Pom. on Sp. Perf.* § 9, and notes; *Cutting v. Dana*, 10 C. E. Gr. 271.

Where jurisdiction exists, the remedy is not of right; the court holds it in judicial discretion, controlled by principles of equity and justice. "The question is not what the court must do, but what it may do under the circumstances." *Radcliff v. Warrington*, 12 Ves. 332.

The bargain or promise to be enforced, whether it exist in the form of writing or be merely verbal, must possess, in substance and external form, the qualities and requisites of a valid contract. The bargain must have been completely determined between the parties, and its terms definitely ascertained. So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed.

An important question in the cause is, whether these parties ever reached the point where it could be said they were agreed upon all the essential terms of the contract to assign the gift in the will. If the parties and witnesses who testified in the case are credible men, and there is no intimation from any quarter that they are not all of them entirely so, it would seem impossible, out of the conflict of views entertained and statements made by them, to reach any other conclusion than that they were, during their negotiations, and since then have remained, at irreconcilable variance in respect to important particulars touching the subject of their treaty.

Brown, by his responsive answer to the bill, and in his testimony, persistently and forcibly asserts that he never agreed to assign his interest except upon the condition that some certain portion of the fund to be conveyed should be secured to him for his support, and that he refused to make the transfer, awaiting the concurrence of those creditors with whom he was in direct negotiation in that demand. That this was truly his position has not only his oath but his full support in concurrent circumstances. The draft of the assignment made by Mr. Ransom was

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so framed as to make some provision for him. That he was in controversy with Mr. Force and his counsel touching this subject, they objecting to such allowance, is not disputed. His being destitute of other means of support, and without employment, give ground for believing that he did not consent to give up his entire means of support, or agree to depend upon a verbal promise of an uncertain charity, and it is equally certain that they did not agree with his purpose to retain a part. The parties were then unsettled as to the subject matter of the contract.

They seem to have been equally unfortunate in determining what surrender or sacrifice the creditors should make in view of an assignment being made for their benefit.

The appellant insists that for it he was to have, in lieu of what he gave, release from the debts as such, or an equivalent protection against their further prosecution. He says in his answer that the agreement was that the claims of the complainant and Force and the other creditors named, "should be released and this defendant discharged from the same."

Attempt had been made by Force to attach him for contempt, and to disbar him, and proceedings of like character were threatened by others. It was, therefore, an important consideration with him that the claims of all these creditors should be changed into the proposed new security, or that some other legal assurance against their further prosecution should be given. For this he was surrendering almost the whole of the fund, and it was his only property. It is thought that there can be small doubt that such was his understanding and expectation throughout the entire effort of the parties at making an agreement.

That the creditors did not come to an understanding on this point, so important to the appellant, admits of as little question.

The acts of some, and the testimony and declarations of all on the creditors' side, make this abundantly manifest. They had not consented to release their debts, but clearly intended to assume and maintain towards their debtor an attitude more advantageous to themselves than they could have had if the assignment had been made under the act governing assignments for the benefit of creditors. The most that they were willing to

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agree to was that they would forbear to prosecute their claims (for how long does not appear) if and when appellant conveyed the fund. This is apparent from the complainant's bill, the cross-bill of Force, and the testimony of Ransom, Weart and Force.

There is little to show that the appellant was not standing out for these terms, save that he was undemonstrative in urging them. The acting creditors assumed, quite naturally, perhaps, to dictate the terms in the respects mentioned rather than treating them as matters to be settled by convention of the parties, and as a result their minds failed to meet on essential terms of the agreement.

A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere by decreeing a specific performance. *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Brewer v. Wilson*, 2 C. E. Gr. 182; *Potts v. Whitehead*, 5 C. E. Gr. 85. Nor will it interfere when the evidence leaves the agreement as to any of its terms in uncertainty. *Clow v. Taylor*, 12 C. E. Gr. 418; *Cooper v. Carlisle*, 2 C. E. Gr. 530.

To give the relief accorded by the decree, it is necessary not only to deny to the appellant the consideration which he relied upon and claimed for his promise, but also that which the appellees conceded as such consideration.

The proposal made by appellant was, as to all the creditors named, an entirety, and was not capable of severance. It was not an offer made severally to each, but the clear purpose was to embrace all, and its entire object, so far as the appellant was concerned, failed of accomplishment if any omitted or refused to accept it. An acceptance could only be by those and all of them to whom the offer was made upon the strict terms of such offer.

There was no release, merger or abatement made of any part of their claims. They were to remain the same after as before the assignment, except as they might be reduced by payment out of the fund after it should be transferred. All that remains,

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then, in the form of consideration, is the unsecured promise not to sue, by a portion of the creditors. But this was not the consideration stipulated for in the appellant's offer, viewed from the standpoint of the appellees. The promise not to prosecute further, which can be regarded as the condition of the offer, was the promise of all. It does not appear that more than two of the creditors accepted or agreed for any delay, and one of the two seems to have conducted his suit to judgment, soon followed by execution, petition instituting supplemental proceedings, and, subsequently, on the 15th of October following, he filed his bill in chancery for the appointment, in his interest solely, of a receiver of this fund.

The acceptance and consent of a part of the creditors in no degree meets the stipulated condition. The failure of a part of them to agree to a condition embracing all, would be a total, not a partial, failure to accept such condition.

In the appellees' view, then, the case is this: appellant agrees to assign a fund in trust for the ratable benefit of six creditors for the consideration that such creditors shall all agree not further to prosecute their respective claims; that two of them having so promised to delay, the contract is complete, the consideration rendered, and performance must be decreed.

The appellant was entitled to the consideration which he stipulated for; that failing, the bargain was off, however advantageous it might have been to appellees, had it been executed.

But there is a further difficulty in the way of this decree, growing out of the operation of the statute of frauds upon a parol agreement concerning the subject matter of this negotiation. The interest of the appellant, which was treated of with a view to its transfer, arises under the following clause in the will of Hosea F. Clark, deceased. "Item. The rents arising from my houses and lands and real estate, which I have directed to be sold, from the time of my decease to the time of such sale and conveyance, after paying thereon all taxes, assessments and repairs and interest on mortgage encumbrances, if any, as the same may be chargeable from time to time, I instruct and direct my executrix and executors, the survivors and survivor of them,

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to pay over in quarterly installments in the following proportions as bequests, which I give to the following persons, viz., to my son-in-law, Archibald K. Brown, an equal one-sixth part thereof." The rents thus given are those arising out of the residue of his houses, lands and real estate remaining after certain specific devises in the will, which residuary real estate the executors were authorized and directed in their discretion to sell.

To the parol contract set up in the bill the appellant has pleaded the statute of frauds, and presents the question whether the interest which he receives by the recital clause in the will is within the meaning of the provision requiring contracts for the sale of lands, tenements or hereditaments, or any interest in or concerning the same, to be in writing.

A rent is an incorporeal hereditament. *2 Bl. Com.* It is a certain profit issuing yearly out of lands and tenements. Lord Redesdale, in *O'Connor v. Spaight*, *1 Sch. & Lef. 306*, held that an agreement between a landlord and his tenant for an abatement of the rent was within the statute. In *Robert on Frauds*, page 126, it is said that without the words "any interest in or concerning lands," the word "tenements" would have included rents under the interpretation given by Lord Coke to that word in the statute *de donis*. In Brown's treatise on the same subject, p. 230, the author summarily disposes of the question by saying, "of course the statute includes rents, commons and all incorporeal hereditaments."

If, then, rents are included within the meaning of the statute, is the clause in question a devise of rents? By its terms it would seem to be clearly so. What he gives is the *rents* arising from his houses and lands and real estate. The executors are authorized to collect the rents, not, however, to make a fund in their hands, but to retain and pay the taxes and other charges upon the lands and to pass over the remainder or net rent to the appellant and other parties named as owners.

If the foregoing views on this part of the case are correct, the alleged agreement being for the sale and transfer of a subject within the statute of frauds, and not being evidenced by any note or memorandum, signed by the party charged or his agent,

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it is unavailing either at law or in equity, and is incapable of specific performance, unless it can be brought within that class of contracts the non-performance of which are held, by reason of peculiar circumstances, to work a fraud upon him who seeks their execution. The most numerous species of the class are those not enforceable at law, by reason of the statute of frauds, but which have been part performed by the party seeking to enforce them.

The doctrine of equity that part performance of a parol agreement takes it out of the statute of frauds, rests on the idea that to plead the statute in the particular instance would work a fraud.

There must be acts in part performance of such a nature that the plaintiff cannot be placed in his original position or adequately compensated by damages. *Pom. on Sp. Perf.* § 106; *Gilbert v. Trustees &c.*, 1 Beas. 204.

In parol agreements for the sale of lands, payment of the contract price by the purchaser is not of itself sufficient part performance to take the case out of the statute, for the reason that money can be recovered back, with interest, by way of damages for its detention. *Clinan v. Cook*, 1 Sch. & Lef. 41; *Hughes v. Morris*, 1 De G., M. & G. 355; *Glass v. Hurlburt*, 102 Mass. 28; *Cole v. Potts*, 2 Stock. 67; *Green v. Richards*, 8 C. E. Gr. 32; *Cutting v. Dana*, 10 C. E. Gr. 271.

A brief and comprehensive statement of the conditions under which courts of equity enforce such contracts is found in *Wright v. Puchett*, 22 Gratt. 374. "1. The parol agreement relied on must be certain and definite in its terms. 2. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. When these three things concur, a court of equity may decree specific execution. When they do not, it will turn the party over to seek compensation in damages in a court of law."

There were no written memoranda signed by the appellants here. The assignment cannot be regarded as such, for the obvi-

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ous reason that it was never delivered for that or any other purpose. *Brown on Frauds* § 354, and cases cited in note 3.

The admission of a parol agreement in the answer is not of the agreement claimed by the complainant, and if it were, his setting up the statute of frauds in bar precludes a decree upon the agreement so admitted. *Van Dyne v. Vreeland*, 3 Stock. 370.

Regarding the pleadings as presenting a case rested on the ground of part performance, it is obvious that, under established rules, proof of such performance is absent.

The appellees, or most of them, it is true, forbore to prosecute their claims. Besides this they did nothing, gave nothing, suffered nothing. Their claims remained as before. It does not appear that Brown has less ability now to pay than then. He had nothing then outside of the legacy, and any change of condition must be an improvement. For their delay in prosecution they had adequate damages at law in interest for their forbearance.

For the foregoing reasons the decree should be reversed.

Decree unanimously reversed.



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1. By the direction of a committee selected to represent and protect the bondholders of a railroad corporation, in the sale of the property and re-organization of the company, a circular was issued requesting each bondholder willing to come in, to deposit his bond with a designated trust institution in New York, together with the amount of a specified assessment to defray the expenses of the proceedings, and to obtain therefor the receipt of such trust institution, countersigned by the representative of the committee to be thereafter designated. The circular further stated where the office of the committee was in New York, and was signed by the members of the committee, including Howard P. Dechert, "secretary," and required such deposit to be made on or before December 31st, 1879. The complainant was the holder of a bond for \$1,000, which she took to the trust company for deposit, together with the amount of her assessment, on January 13th, 1879. The trust company refused to receive it, and referred her to the committee, whereupon she took it to the designated office of the committee, where Mr. Dechert received it and her assessment, giving her a receipt of the committee therefor. Three days after-

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wards, Mr. Dechert, as secretary, deposited with the trust company this bond and four others, taking therefor a certificate in his individual name. The sale was consummated, the company re-organized, and are about to issue new bonds in lieu of the old ones, but refuse to acknowledge the validity of complainant's receipt or her claim to either her old bond or a new one, on the ground that she did not deposit the bond with the trust company.—

Held, that she is entitled to relief, and it is no objection that the present holder of complainant's bond is not made a party, because, for aught that appears, either the committee or its agent, the trust company, holds it; or if the secretary of the committee has misappropriated it, such act does not prejudice complainant; nor does it appear that any one having an interest has been omitted, nor that complainant failed in a strict compliance with the instructions of the committee's circular, as to deposit with the trust company, because the committee waived such requirements by accepting the bond and assessment. *Hitchcock v. Midland Railroad Co.*, 86

2. A mortgage, given in 1875, payable in five years, was assigned by the mortgagee to complainant January 5th, 1876, and the assignment recorded February 16th, 1876. The bond and mortgage and assignment all remained in the hands of the mortgagee, as agent of the assignee, for the collection of the interest, until November 1st, 1877, during which time the interest and part of the principal were paid by the mortgagor to the mortgagee, who paid over the interest to the complainant, but none of the principal. After November 1st, 1877, similar payments were made to the mortgagee, who again paid over the interest, but not the principal.—*Held*, that the payments of the principal made to the mortgagee after the assignment, and while the instruments remained in his possession, must be credited on the mortgage; *aliter*, as to such payments, after they had been withdrawn from him by the complainant. *Emery v. Gordon*, 447

Alteration.

See CANCELLATION; GUARDIAN, 2.

Appeal.

1. The making of an order to set aside a sale of lands is a proper matter of appeal, either by the parties to the suit or by the purchaser. *Mut. Life Ins. Co. v. Sturges*, 328
2. After the court had refused a preliminary injunction for the removal of an oil pipe and to prevent its use by defendants, and had discharged an *ad interim* order staying the defendants in the premises, and an appeal therefrom had been taken and was pending, an application to this court to continue such *ad interim*

Appeal—Continued.

order, merely on the ground of the appeal, was denied. *Central Railroad Co. v. Standard Oil Co.*, 372

3. The burden of showing error is on the appellant, and in case of doubtful statutory construction, the court will not reverse. *Smith v. Newark*, 545

See INJUNCTION, 3; PARTIES, 5.

Assignments for Creditors.

1. The time limited for creditors to file their claims with an assignee, under an assignment for the benefit of creditors, expired on the 8th day of January. On that day, the appellant, a creditor residing in Philadelphia, discovered that fact, although, by misreading his own entry, he had previously supposed the 18th of January was the last day. He thereupon forwarded his claim to the assignee at Newark, by mail, which ought to have been delivered at five o'clock in the afternoon, but was not, in fact, delivered until the next day.—*Held*, that such claim was neither "presented" nor "exhibited" to the assignee, within the terms of the statute, within the time limited. *Ellison v. Lindsley*, 258
2. An assignee, under an assignment for the benefit of the creditors of the assignor, pursuant to the act entitled "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors" (*Rev. 36*), may file a bill to set aside a prior conveyance of lands made by the assignor for the purpose of defrauding his creditors, if the property so conveyed is required for the payment of the claims of creditors, and creditors who were intended to be hindered, delayed and defrauded by such conveyance have presented their claims to the assignee for allowance. *Pillsbury v. Kingon*, 287
3. Assignees, under the assignment act, and executors and administrators of insolvent estates, are the representatives of creditors, and, as such, may, for the benefit of creditors, set aside conveyances by the assignor or the decedent, in fraud of creditors, to the extent that such property is needed for the payment of debts. *Id.*, 287

See EXECUTORS, 10; MARSHALING ASSETS, 1.

Attachment.

1. Moneys in the hands of a sheriff, raised by him in pursuance of a decree of the court of chancery, are liable to seizure, by virtue of a writ of attachment. *Conover v. Ruckman*, 303

B.**Bankruptcy.**

1. A defendant in a chancery suit being decreed a bankrupt between a decree *pro confesso* and a final decree, does not abate or stay the proceedings. *Davis v. Sullivan*, 569

Betterments.

1. Where a party, lawfully in the possession of land, under a title which turns out to be defective, makes permanent improvements, in good faith, before he has notice that his title is defective, which materially increase the value of the inheritance, and the actual owner afterwards seeks relief against him in equity, relief will not be given except upon equitable terms. *Foley v. Kirk*, 171

See PARTITION, 2.

Bills and Notes.

1. On a note made by the complainant for the accommodation of the endorser, with the payee's (the defendant's) knowledge that it was made for accommodation, the defendant recovered a judgment at law. Afterwards the defendant, without the complainant's knowledge or consent, took the endorser's notes, some of which were paid and others renewed and not paid, on which judgment was recovered.—*Held*, that the giving of time to the endorser, by taking his notes, discharged the maker from liability on the original judgment. *Westervelt v. Frech*, 451

See CORPORATION, 12; USURY, 4,

C.**Cancellation of Instruments.**

1. A party who files a bill alleging that a paper made by him has been altered since its execution, and asking to have it canceled, must prove the fact of its subsequent alteration. *Putnam v. Clark*, 338
2. Such a party does not occupy the same position as if he were resisting a claim founded upon such altered instrument, and he cannot successfully ground his right to a cancellation of it upon a technical presumption of a false alteration arising from a suspicious circumstance merely. *Id.*, 338

See FRAUD, 1; JURISDICTION, 1.

Cases Criticised.

Bacon v. Bonham, 12 C. E. Gr. 209.

Affirmed, *Bacon v. Bonham*,

614

Brown v. Brown.

Reversed, *Brown v. Brown*,

650

Budd v. Van Orden, 6 Stew. Eq. 143.

Affirmed, *Van Orden v. Budd*,

564

Camden H. R. Co. v. Citizens Coach Co., 4 Stew. Eq. 525.

Affirmed, *Citizens Coach Co. v. Camden H. R. Co.*,

267

Campbell v. Tompkins, 5 Stew. Eq. 170.

Affirmed, *Tompkins v. Campbell*,

362

Conover v. Ruckman, 5 Stew. Eq. 105.

Reversed, *Conover v. Ruckman*,

303

Cases Criticised—Continued.

Clark v. Davis, 5 Stew. Eq. 530.	
<i>Affirmed</i> , Davis v. Clark,	579
Cubberly v. Cubberly, 6 Stew. Eq. 82.	
<i>Affirmed</i> , Cubberly v. Cubberly,	591
Eddy's Case, 5 Stew. Eq. 701.	
<i>Modified</i> , Eddy's Case,	574
Eyster v. Gaff, 1 Otto 521.	
<i>Criticised</i> , Davis v. Sullivan,	572
Gaines v. Green Pond Mining Co., 5 Stew. Eq. 86.	
<i>Modified</i> , Gaines v. Green Pond Mining Co.,	603
Gardner v. Jersey City, 5 Stew. Eq. 586.	
<i>Reversed</i> , Jersey City v. Gardner.	622
Hill v. Beach, 1 Beas. 31.	
<i>Explained</i> , Conover v. Ruckman,	304
Johnson v. Somerville, 6 Stew. Eq. 152.	
<i>Affirmed</i> , Johnson v. Somerville,	621
Johnston v. Hyde, 5 Stew. Eq. 446.	
<i>Affirmed</i> , Johnston v. Hyde,	632
Lawrence v. Emson, 4 Stew. Eq. 67.	
<i>Affirmed</i> , Emson v. Lawrence,	286
Miller v. Colt, 5 Stew. Eq. 6.	
<i>Affirmed</i> , Colt v. Miller,	362
Mut. Life Ins. Co. v. Sturges, 5 Stew. Eq. 678.	
<i>Reversed</i> , Mut. Life Ins. Co. v. Sturges,	328
Pinnell v. Boyd, 5 Stew. Eq. 190.	
<i>Reversed</i> , Boyd v. Pinnell,	600
Pillsbury v. Kingon, 4 Stew. Eq., 619.	
<i>Reversed</i> , Pillsbury v. Kingon,	287
Perrine v. Vreeland, 6 Stew. Eq. 102.	
<i>Affirmed</i> , Perrine v. Vreeland,	
Poulson v. Nat. Bank of Frenchtown, 6 Stew. Eq. 250.	
<i>Affirmed</i> , Poulson v. Nat. Bank of Frenchtown,	618
Price v. Weehawken Ferry Co., 4 Stew. Eq. 31.	
<i>Affirmed</i> , Jewett v. Price,	
Putnam v. Clark, 2 Stew. Eq. 412.	
<i>Affirmed</i> , Putnam v. Clark,	338
Sayre v. Hewes, 5 Stew. Eq. 652.	
<i>Reversed</i> , Hoag v. Sayre,	552
Richardson v. Peacock, 1 Stew. Eq. 151.	
<i>Affirmed</i> , Peacock v. Richardson,	597
Ruckman v. Ruckman, 5 Stew. Eq. 259.	
<i>Reversed</i> , Ruckman v. Ruckman,	354
Shinn v. Zimmerman, 3 Zab. 150.	
<i>Explained</i> , Conover v. Ruckman,	304

Cases Criticised—Continued.

Smith v. Newark, 5 Stew. Eq. 1.	
<i>Affirmed</i> , Smith v. Newark,	545
Tillotson v. Gesner.	
<i>Reversed</i> , Tillotson v. Gesner,	313
Van Houten v. Post, 5 Stew. Eq. 709.	
<i>Reversed</i> , Van Houten v. Post,	344
Van Keuren v. McLaughlin, 6 C. E. Gr. 163.	
<i>Overruled</i> , Pillsbury v. Kingon,	303
Welsh v. Crater, 5 Stew. Eq. 177.	
<i>Affirmed</i> , Crater v. Welsh,	362
Wisham v. Lippincott, 1 Stock. 353.	
<i>Doubted</i> , Davis v. Howell,	76
Williams v. Allen, 5 Stew. Eq. 485.	
<i>Affirmed</i> , Allen v. Williams,	584

Chattel Mortgage.

See EVIDENCE, 5.

County.

See CORPORATION, 1-3.

Condition.

See CORPORATION, 16; DEVISE, 1; LEGACY, 2.

Constitution.

1. That section of the general railroad law which authorizes a railroad corporation to enter on lands and begin constructing their road, after paying into the circuit court of the county where the lands lie, the amount awarded, pending their appeal from such award, is unconstitutional in that compensation, or a tender thereof to the land-owner, does not precede the use and occupation of his lands; and for want of such tender he may enjoin the company from entering upon his lands and constructing their road thereon. *Redman v. Phila., M. & M. R. R. Co.*, 165
2. The act of 1880 (*P. L. of 1880 p. 255*), providing that in foreclosure proceedings thereafter commenced, no personal decree for deficiency shall be taken, applies to mortgages given before the date of its passage, and is not, so far as cases in which there is a remedy at law are concerned, unconstitutional as depriving a party of any remedy for enforcing a contract which existed when the contract was made, because a more efficacious remedy of the same sort at law remains, and the legislature may, without infringing the prohibition of the constitution, take away one of two or more equally efficacious remedies of the same sort. *Newark Sav. Inst. v. Forman*, 436

See MUNICIPAL CORPORATION, 3; TAXES, 2.

Contempt.

A defendant discharged from imprisonment for contempt in disobeying an order, although he had not cleared his contempt, the chancellor being of opinion that the authority of the court had been vindicated in the imprisonment which the defendant had undergone. *McClung v. McClung*,

462

See INJUNCTION, 2.

Contract.

1. A testatrix, after giving several legacies, gave the residue of her estate to her executor, to be by him distributed to such charitable or religious societies or associations or corporations, or for such other benevolent purposes, as he might see fit. Her next of kin were an uncle D. and two aunts, Mrs. G. and Mrs. R. Another aunt was dead, leaving children—Samuel, Alexander and the complainants—surviving. The probate of the will in New York, where testatrix lived, was opposed by D. and others. Pending the contest, Samuel falsely represented to Mrs. G. and Mrs. R. that D. had abandoned his opposition to the will, and promised that if they would make him their attorney to recover their interests in the estate, and would divide equally with him whatever he should recover for them as next of kin, he would attend to the litigation, pay all the costs and expenses himself, and divide the sum he received from them equally with his brothers and sister, the complainants, who, he stated, were poor and needy. Thereupon Mrs. G. and Mrs. R. gave him a power of attorney to act for them in the premises. D. continued his opposition to the will, and the contest was eventually compromised by admitting the will to probate, but declaring the residuary clause void. Mrs. R. and Mrs. G. gave one-half of what they received, as next of kin, to Samuel, who refused to divide it equally with complainants.—*Held*, (1) that Samuel's promise to Mrs. R. and Mrs. G. to so divide with complainants was enforceable in equity, and that they were entitled to an account of his expenses about the litigation and to their several shares of the amount received by him under the agreement; (2) That neither Mrs. R. nor Mrs. G. were necessary defendants or complainants, although they might have been proper complainants. *Cubberly v. Cubberly*,

82

2. Defendant sold to complainant the fixtures and good will of a business which largely consisted in purchasing poultry in designated districts, and shipping it to New York for sale; and also covenanted with complainant that he would not, at any time, send or ship to New York any poultry coming from those districts. Afterwards, he engaged in New York in the sale of poultry on commission, ordering all his supplies to be shipped from those districts, sometimes in advance of his sales, sometimes to fill contracts of sale previously made.—*Held*, that in so doing he was

Contracts—Continued.

violating his covenant, and should be restrained. *Richardson v. Peacock*, 597

See CONSTITUTION, 2; CORPORATION, 6; EXECUTORS, 1.

Conveyances.

What acts or words shall constitute a delivery of a deed must depend upon the circumstances of each case. *Brown v. Brown*, 650

See FRAUDS AND PERJURIES; SPECIFIC PERFORMANCE.

Corporation.

1. Independent of the statute, and simply as a matter of courtesy, this court may extend its aid to the receiver of a foreign corporation, for the purpose of enabling him to get possession of property, which should, in equity, be applied in payment of the debts of the corporation. *Nat. Trust. Co. v. Miller*, 155
2. This court may appoint a receiver of a foreign corporation having property in this state, as auxiliary to the proceeding instituted against it in the state which created it, and confer upon him the same powers that it is authorized to grant to the receiver of a domestic corporation, so far as they may be necessary to the recovery and collection of the assets of the corporation. *Id.*, 155
3. And the court is bound to give such receiver the same remedies and aid, in the collection of the assets of the corporation he represents, that it would give to the receiver of a domestic corporation. *Id.*, 155
4. It is a cardinal rule of the law of corporations, that a corporation created by statute can exercise no power, and has no rights, except such as are expressly given, or necessarily implied. *Id.*, 155
5. Nor can the powers of a corporation be in the slightest degree enlarged or extended by the assent of the stockholders, or by any action they may take. *Id.*, 155
6. A contract not within the scope of the powers conferred on a corporation, cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action. *Id.*, 155
7. Equity regards the property of a corporation as a fund held in trust for the payment of its debts, and if others than *bona fide* creditors of the corporation or purchasers possess themselves of it, they take it charged with this trust, which a court of equity will enforce against them. *Id.*, 155
8. Where preferred stock is issued under a contract or law containing no provision or direction as to what shall be the rights of the holders of it in the distribution of capital when the affairs of the company are wound up, such stock merely has a right to be preferred in the division of profits, and not in the distribution of capital. *McGregor v. H. M. L. Co.*, 181

Corporation—Continued.

9. The general corporation act of this state directs that in the distribution of capital the holders of preferred stock shall be first paid, before any distribution is made to the holders of the common stock; therefore preferred stock issued in this state, either under authority of law or under a contract of which the law forms a part, is entitled to preference in the distribution of capital. *Id.*, 181
10. Dividends on preferred stock can only be paid out of the profits; and this is so even when the stock is issued under a guaranty that a dividend of a certain sum shall be paid annually. *Id.*, 181
11. The rule of distribution presented by the corporation act must be observed, whether the affairs of a corporation are wound up by the court or the officers of the corporation. *Id.*, 181
12. The sixty-third section of the corporation act is in these words: "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for or as workmen or employees, in the regular employ of such corporation."—*Held*, (1) that the lien so given comes into existence as of the date which the court adjudges to be the time when the insolvency occurred which gives it jurisdiction; (2) that persons holding claims for wages, who are not in the employ of a corporation at the time when it becomes insolvent, are not within the policy of the act, and therefore have no lien upon the assets thereof; (3) that the presentation of a claim, embracing other items than charges for wages, does not work a forfeiture of the right of lien for the wages, given by the statute; (4) that the laborers in the employ of a corporation at the time of its insolvency have a lien upon the assets thereof for the whole amount of wages due to them respectively, no matter how long before the date of insolvency the wages may have accrued; (5) that the acceptance of a promissory note, without security, does not operate as a waiver of the lien given by the statute, unless an intention to relinquish such right is unmistakably manifested; (6) that the lien given for wages does not include interest which has accrued thereon before the lien attaches; (7) that the proving of a claim for a sum in excess of the amount really due does not work a forfeiture of the right of lien. *Del., L. and W. R. R. Co. v. Oxford Iron Co.*, 192
13. The right acquired by a horse railroad company, under a legislative grant authorizing it to lay rails in a public highway, and to run cars thereon, charging fare, is such as entitles it to exclude from the habitual and continuous use of its tracks all companies and persons engaged in carrying passengers for hire, in competition with it. *Citizens Coach Co. v. Camden Horse Railroad Co.*, 267

Corporation—Continued.

14. That the right of a horse railroad company is thus exclusive, is not inconsistent with the view that such a railroad, laid on a public highway, is only a modification of the public use to which the highway was originally devoted, and not an additional burden on the land for which compensation may be required. *Id.*, 267
15. The right of the horse railroad company arises from the legislative control of the public easements of highway. The legislature may, when it deems it judicious to do so, grant to a private corporation some interest in the public highway, imposing on it a duty and obligation to provide for public travel thereon in a mode promotive of the public good. In such case the public easement remains unchanged in character or degree. The private corporation acquires so much of the public use as is necessary for the purposes of its grant, and other public uses are limited and restrained for the attainment of such purposes. *Id.*, 267
16. Arising from the legislative requirement that the rails shall be laid on the level of the highway, and of a width corresponding to the wagon-track established by law, there is an implied permission, on the part of the horse railroad company, to the use of the track by other vehicles to some extent. Such permission does not emanate from the company so as to be revocable by it. It results from the nature of the grant, and is in the form of a condition resulting from the grant and its acceptance. The use, however, thus impliedly permitted is only such as is consistent with the grant to the company, and not destructive of its purpose. Any use inconsistent with the grant, and destructive of its purpose, is excluded. *Id.*, 267

See INJUNCTION, 1, 2; RECEIVER.

Costs.

1. A solicitor who is a party to a suit and appears in his own behalf, is entitled to the allowances made by the fee bill for his services therein, except a retaining fee. *Flaacke v. Jersey City*, 57
2. Certain items of cost and their taxation and allowance considered. *Id.*, 57
3. The act of 1879 (*P. L. of 1879 p. 103*) only applies to the clerk's fees on papers bearing specified endorsements, and not to affidavits of verification and schedules attached to bills or answers. *Id.*, 57
4. A complainant who is a non-resident will not be required to give security for costs, if he is joined with a resident complainant. *Jones v. Knauss*, 188
5. Although the allowance of the costs, expenses and counsel fees of the caveators against the probate of a will is, by statute, discretionary with the court, yet, when there exist no reasonable grounds for contesting such probate, or the litigation is needlessly protracted and expensive, such allowance should be denied. *Mallott v. Bamber*, 253

Costs—Continued.

6. Costs of printing a volume of three hundred pages of testimony, nine-tenths of which consisted of matters entirely irrelevant to the issue, not allowed to either party as against the other. *Ruckman v. Ruckman*, 355
7. In an exceptional case, when strong and well-founded doubts exist as to the mental capacity of a testatrix, and with respect to the force and character of the influence under which the testamentary act was performed, the caveators are entitled to their costs and reasonable counsel fees. *Eddy's Case*, 574

SEE DIVORCE, 11; TENDER.

D.**Debtor and Creditor.**

See EXECUTOR, 13; FRAUD, 3; FRAUDULENT CONVEYANCES; MORTGAGE, 2; PARTIES, 3; PLEADING, 1.

Dedication.

See MUNICIPAL CORPORATION, 1.

Delivery.

See MORTGAGE, 7.

Demurrer.

See JURISDICTION, 5; PLEADING, 3, 5.

Descent.

See MARSHALING ASSETS, 2; TRUSTS, 1.

Devise.

1. A testator gave to his wife \$4,000, "the same to be put at interest in some safe investment, and secured to her during her natural life." He also gave her an annuity of \$400, charged on his homestead farm, which he gave to his only child, and added, "It is further my will that the said Amy reside on the aforesaid farm after my decease, and take proper care of the same. In case they (I mean Amy and her husband) should not see proper to move on the same, then I order my executor to sell the same farm at public vendue to the highest bidder; but there is nothing herein contained that affects the dower of \$400 devised to my wife aforesaid." Testator died in 1869, and shortly afterwards Amy and her husband removed to the farm and occupied it for two years, when they leased it until 1880, and then returned, and now reside thereon.—*Held*, (1) that the gift of \$4,000 to his wife was absolute; (2) that Amy's estate in the farm was a fee simple, chargeable with the annuity of \$400, and not defeasible on her ceasing to reside thereon. *Cusper v. Walker*. 35
2. By a will, proved in 1849, a testator gave to his executor his

Devise—Continued.

homestead farm in trust during the life of his daughter (petitioner's mother), to receive the rents and profits, and to pay them to her for her separate use, and to keep the property clear of any encumbrance by her or her husband; and he gave the farm, after her decease, to such person or persons as should be her heir or heirs at law of land held by her in fee simple. In 1868 the farm was sold by order of this court, under the act authorizing the sale of lands limited over to infants or in contingency, the proceeds paid into court and invested for the benefit of the parties interested.—*Held*, that such proceeds of sale could not be paid over to her children and heirs at law, on their own application, exhibiting the release of their mother and her consent thereto; nor can they be paid over until after her death, because it cannot until then be determined who are her heirs at law. *Bartles' Case*.

46

Distribution.

1. A testator directed his executors to divide the income from his estate as follows: one-third to his wife; one-third to her then unborn child, if it should live, and the other third to his son Benjamin; that if either child should die or the unborn one should not be born alive, the survivor should receive the other's share; that if both children should not attain twenty-one, or should die without leaving lawful issue, their estates should go to testator's brother David's children, equally; that the share of each child should be paid to him on his attaining his majority, and they should also receive their mother's share at her death. Testator died in 1829; his posthumous child was born alive, but died in infancy in 1830; Benjamin attained his majority, and died in 1853, unmarried, without issue and intestate. Testator's brother David had two children. The widow died in 1879.—*Held*, that David's children took the share left to the widow, not under the will, but as next of kin of Benjamin. *Gill v. Roberts*,

474

2. Where all of the next of kin are children of brothers and sisters, they take *per capita*. *Wagner v. Sharp*,

520

See EXECUTORS, 2.

Divorce.

1. Proof that a husband and wife have lived separate, and that the husband has not supported his wife, does not establish willful, continued and obstinate desertion, so as to authorize a divorce. *Bourquin v. Bourquin*,

7

2. The separation of a husband and wife, acquiesced in by the wife, and which she did much to bring about, however long continued, does not constitute desertion to authorize a divorce on her petition. Such a separation, however, would become desertion from

Divorce—Continued.

the time the complaining party makes sincere overtures to terminate it. *Hankinson v. Hankinson*,

66

3. A wife, with her child, left her husband, in 1873, owing to his utter inability to maintain them, and after he had pledged a mortgage belonging to her, and constituting nearly all of her separate property, to secure his own debt, and pawned her jewelry and silver plate. Soon after she left, she, by the advice of her relations, declined to return to him until she could be satisfied of his ability to support her. He apparently acquiesced in her living separate from him until 1878. In 1879 she absolutely refused to return to him.—*Held*, that her conduct, prior to 1879, if desertion at all, was not obstinate, within the meaning of the statute. *Belden v. Belden*,

94

4. If a husband drives his wife away, or treats her so brutally as to compel her to flee for safety, or is so cruel and malignant towards her as to show that he means to force her from his home, though she leaves the matrimonial habitation, he, in law, deserts her. *Skean v. Skean*,

148

5. But a mere failure by a husband to furnish his wife with sufficient support is not a ground of divorce, nor will he be considered a deserter if she leaves him for that cause. *Id.*

148

6. So long as a husband shares with his wife whatever means of support he may have, the law makes it her duty to abide with him; and if she leaves him because he does not give her as much or as good as she desires, or as may be necessary, the law considers her a deserter. *Id.*,

148

7. To establish desertion, three things must be proved: first, cessation of cohabitation; second, an intent in the mind of the defendant to desert; and, third, that the desertion was against the will of the complainant. *Sergent v. Sergent*,

204

8. To constitute desertion, the deserter must absent himself or herself from the other party, of his or her own accord, and without the consent and against the will of the other. *Id.*,

204

9. That one is the deserter in whose mind the desire and intent to destroy the marriage relation exist, though the other may be the one who, by open conduct, throws off marital duty and allegiance. *Id.*,

204

10. Where a wife in anger told her husband that he "might go his way and she would go hers," and gave other evidence of her desire that they should live separate, but immediately retracted and besought him not to go, and he, notwithstanding her entreaties, left her in a passion, and, without any attempt at reconciliation and without contributing anything towards her support or even communicating with her in any way, remained away from her for three years, living all the time in the same county with her.—*Held*, that she was entitled to a divorce for desertion. *Schanck v. Schanck*,

363

Divorce—Continued.

11. On an application for temporary alimony and counsel fee, in a suit for divorce for extreme cruelty, it was argued that from the statements of the bill, the cruelty complained of was the result of the husband's insanity.—*Held*, that a wife is equally entitled to protection against extreme cruelty on the part of her husband, where his malevolence is the result of insane delusion, as where it springs from jealousy or hatred. *Smith v. Smith*, 458

See EVIDENCE, 1, 2, 4.

Dower.

1. On a sale of lands, \$500 were retained by the purchaser, out of the consideration, as an indemnity against an alleged right of dower in the premises, and a bond and mortgage thereon, given by him to the vendor to secure that amount and "lawful" interest, the principal payable only on the extinguishment of the claim.—*Held*, (1) that the mortgage could be foreclosed for arrears of interest, although the principal had not become due through the extinguishment of the alleged claim of dower; (2) that the dower claimant could not, on this foreclosure, although made a party defendant, be required to litigate her right to dower in the premises. *Van Doren v. Dickerson*, 388

See EXECUTORS, 1.

E.**Easement.**

1. Where the complainant is entitled to an easement of the flow of the waters of a natural stream through an artificial raceway, constructed on the lands of the defendant, which the defendant has wrongfully interfered with, a court of equity, on final hearing, may, by a mandatory injunction, compel the defendant to restore the raceway to its former condition. *Johnston v. Hyde*, 632
2. Where, upon the construction of a deed, it appears to have been the intention of the parties to make a grant of a certain quantity of water measured by an existing dam and raceway on lands of the grantor, the grantee is not bound to use the water in a particular manner, though it be mentioned in the deed that the water privileges were "for the purpose of a saw-mill." He may use the water in a different manner or in a different place, or increase the capacity of the machinery propelled by it, without affecting his rights, provided the quantity used is not increased, and the change does not prejudice the rights of others. *Id.*, 632
3. Where the grant is of a water-power, and it be left in doubt whether the kind of mill mentioned indicates the quantity of water and measures the extent of the power intended to be granted, or the grant is of water to drive a particular kind of a mill, the former construction will be favored. *Id.*, 632

Easement—Continued.

4. If the right to an easement of the flow of water has been derived by grant, it may be extinguished by a possession of the servient tenement adverse to the easement for the full period of twenty years, but will not be lost by mere non-user. *Id.*, 632
5. The owner of an easement may lose his right to it by acquiescence, as where he has discontinued the use of the easement under circumstances indicating his intention to renounce it, and the owner of the servient tenement, relying on his conduct, has been induced to make expenditures in altering and improving his premises, which expenditures would be rendered useless if the owner of the easement should resume the use of it. Under such circumstances in some cases the easement has been considered in equity as extinguished, though the discontinuance of the use of it has been for a period of less than twenty years. Cases of this class depend on the doctrine of equitable estoppel. *Id.*, 632
6. In 1824, E. was the owner of a saw-mill driven by the waters of a natural stream, diverted from the stream, and carried to his mill by means of a dam and raceway on the lands of D. In May, 1824, E. conveyed to D. a moiety of the saw-mill and race, together with the equal half part or moiety of the water privileges and water courses belonging to said saw-mill, "the dam to be raised no higher than it now is, without the consent of the parties, and the said raceway to be and remain as it now stands." On the same day, D. conveyed to E. the equal undivided half part or moiety of the dam and pond situate on his lands, with the one equal moiety of water and water privileges thereto belonging, for the purpose of a saw-mill, "the dam to be raised no higher than it is at this time, without the consent of the parties." In June, 1824, D. conveyed to W. his moiety of the saw-mill and the water-courses, together with the privilege, for the said saw-mill, of the water, dam and race on his lands, "the dam to remain as it now stands * * * and the race, dam and pond to be and remain where it now stands, and not to be altered." In 1835, W. conveyed to E. the moiety of the mill and water privileges he acquired from D. The complainant and defendant, respectively, acquired title under E. and D.—*Held*,
 - (1) That the grant was of an easement of the right to the flow of so much of the waters of the stream as the dam then standing would divert, and to the use of the raceway as it then was, as the conduit by which the water should be carried to the mill, and also, as incident thereto, the right to cleanse and repair the raceway and dam, and to do whatever might be necessary and proper to keep them in a condition fit for the purposes for which they were designed. *Id.*, 632
 - (2) That a change in the location of the water-course, and the substitution of a box aqueduct, enclosed and covered over, and of less capacity for the open raceway through the servient tenement,

Easement—Continued.

was an injury to the complainant's easement, for which the complainant might have relief in equity. *Id.*, 632

7. The owner of the dominant tenement has no property or rights in the servient tenement except such as are incident to the enjoyment of his easement. The owner of the servient tenement can do no act on his lands which interferes substantially with the easement, or with those rights which are essential to the full enjoyment of its benefits ; but the utmost extent of the duty which rests upon the owner of the servient tenement, is not to alter its condition so as to interfere with the enjoyment of the easement. How far the owner of the servient tenement is interdicted from acts of ownership on his lands will depend upon the nature and qualities of the easement. *Id.*, 632

8. The chancellor decreed that the complainant was entitled to an easement of an open raceway through the defendant's lands, of a certain width and depth. He ordered that a box aqueduct placed therein should be removed, and the raceway should be restored to its former condition, and that the defendant should be perpetually enjoined from obstructing the complainant in the enjoyment of his easement.—*Held*, in affirming the decree,

- (1) That the decree did not interdict the defendant entirely from acts of dominion over the strip of land on which the raceway was located ; that the defendant might throw bridges over the raceway to connect the two parcels into which his lands were severed by the raceway, and generally might exercise over the premises such acts of ownership as would not substantially interfere with the complainant's enjoyment of his rights therein ; and
- (2) That when the defendant shall have obeyed the mandatory part of the decree, whether the acts he shall do in the future are an interference with the complainant's rights, is a question that will arise when the inquiry arises whether the prohibitions of the injunction have been disregarded. *Id.*, 632

See CORPORATION, 13-16.

Eminent Domain.

1. Where a statute relating to drainage authorized the commissioners to purchase a mill property, and such commissioners, having previously made an assessment to meet the general expenses of the scheme, entered into a contract to purchase under a large penalty ; and not being in funds at the day for performance, in consequence of the non-payment, in part, of such assessment, advanced their own moneys to make up such purchase-money—*Held*, on bill filed, that they were entitled to be re-imbursed by an equitable enforcement of such assessment. *Allen v. Williams*, 584
2. When persons acting for others under statutory authority advance

Eminent Domain—Continued.

moneys in good faith and beneficially for the persons whom they represent, re-imbursement of such moneys will, as a general rule, be allowed in a court of equity. *Id.*, 584

3. Where lands are so taken, and the duty to pay an award therefor, and the right of the owner to be paid, is complete, the owner may maintain an action for the award if the statute directing proceedings for condemnation provide no special mode of enforcing payment. *Jersey City v. Gardner*, 622

See CORPORATION, 14.

Estates.

See JURISDICTION, 3.

Estoppel.

1. An account of an executrix and her husband, guardian of the share of the daughter of the former, was settled by the daughter (the ward) and her husband thirty-four years before the filing of the bill, which was by the daughter (whose husband was dead), for an account of her share. The ground relied on was errors in the account which was settled, and the fact that the daughter was, when it was settled, a minor.—*Held*, that the claim was a stale one, and that, under the circumstances, she was bound by the settlement, notwithstanding her minority. *Wood v. Chetwood*, 9
See PLEADING, 9; USURY, 3.

Evidence.

1. The act of 1880 (*P. L. of 1880 p. 52*), "that in all civil actions, in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; *provided, nevertheless*, that this supplement shall not extend so as to permit testimony to be given as to any transaction with, or statement by any testator or intestate represented in said action," does not, by virtue of its provision that any party to any action may be sworn, remove the prior statutory disqualification of a husband or wife, in a suit for divorce on the ground of adultery, to testify to anything except the fact of marriage. *Wells v. Wells*, 4
2. In a suit by a husband for divorce from his wife on the ground of adultery, a non-resident detective had been employed by the husband, and examined by him in reference to one matter only, and cross-examined by the wife's counsel, after which he left the state.—*Held*, that the court would not order the husband to produce him again for examination by the wife as to other matters; nor would the husband be ordered to produce the correspondence between himself and such detective, during the latter's employ-

Evidence—Continued.

ment by the husband, such letters being in the hands of the detective and not at all under the husband's control. *Id.*, 4

3. Although an answer, under oath, denying fraud, be not overcome by the testimony of two witnesses, or what is equivalent thereto, yet such answer, if it contain admissions of facts from which fraud follows as a natural and legal, if not a necessary and unavoidable conclusion, does not disprove such fraud. *Hoboken Bank v. Beckman*, 53
 4. In a suit by a husband for divorce on the ground of his wife's adultery, the fact that the alleged paramour of the wife was within reach of process at the time of examining the witnesses, and was not called to testify on behalf of the wife's innocence, is significant, and corroborative of the other witnesses' testimony as to her guilt. *Bibby v. Bibby*, 56
 5. A bond and mortgage on lands, and also a bill of sale of chattels, were given to secure the payment of a debt.—*Held*, that parol evidence which was inconsistent with the terms of a contemporaneous agreement in writing between the parties, in regard to the disposition of the mortgaged chattels to pay the mortgage, was incompetent. *Carlton v. Vineland Wine Co.*, 466
- See* APPEALS, 3; CANCELLATION, 1; COSTS, 6; INSANITY, 2; LEGACY, 5-8; TRUST, 2-4.

Executors and Administrators.

1. Lands of an insolvent decedent were sold, free of his widow's dower, to pay his debts. To secure such dower, the purchaser gave the administrators a mortgage for \$2,700, the interest whereof was payable to the widow for life, and the principal, at her death, to her husband's heirs at law. The purchaser also gave another mortgage on the premises, prior to the widow's, which was afterwards paid off. The widow's dower was, in fact, only \$1,700, and the purchaser afterwards borrowed \$2,600 of the complainant. By an agreement with the administrators, without the privity or consent of the widow, the complainant's mortgage was to be the first lien on the premises—the administrators agreeing with the lender to indemnify him against the widow's claim to priority; and this agreement was consummated by canceling the widow's mortgage, and substituting another for \$1,700, in lieu of it, subsequent to complainant's.—*Held*, in a suit for foreclosure of the lender's mortgage, that the rights and priority of the widow were unaffected thereby, but that relief could be obtained by her, in the suit, only by cross-bill. *Fine v. King*, 108
2. An order of distribution of an estate was made in December, 1867. One distributee was absent, and, on the presumption of his death, his next of kin applied for his share, but the administrator refused to pay it over, and no compulsory proceedings were

Executors and Administrators—Continued.

- taken against him. The administrator retained the share ready for payment until April, 1877, when he deposited it in a savings bank, where it drew six per cent. interest. Shortly afterwards, he withdrew it, and applied it all to his own use. The distributee appeared in 1878, and in proceedings against the administrator's sureties—*Held*, that they must pay interest on the share at six per cent., after and during its deposit, and at seven per cent. (the legal rate) from the time of its withdrawal until July 4th, 1878, and at six per cent. (the legal rate from that time) subsequently. *Doremus's Case*, 234
3. An executor has no right, without authority from a competent court, to invest the funds of the estate in municipal bonds or bank stock. *Tucker v. Tucker*, 235
4. Where commissions are paid on part of the estate at an intermediate accounting, commissions can only be allowed on the amount which comes into the executor's hands afterwards, and such commissions are calculated as if the subsequent receipts were part of the prior receipts. *Id.*, 235
5. A mortgagee is entitled to a grant of letters of limited administration on the estate of a deceased subsequent mortgagee of the same premises, who was a non-resident, no administration having been taken out here on his estate, but such administration will be limited to the proceedings already taken, or that may hereafter be taken in the pending foreclosure, or in any other supplementary proceedings for relief on the mortgage. *Lothrop's Case*, 246
6. Acts done by one of several executors, which relate to the delivery, gift, sale or release of the testator's personalty, are deemed the acts of all, and bind the estate accordingly. *Mut. Life Ins. Co. v. Sturges*, 328
7. Under an order of the orphans court, an administratrix sold lands of her intestate to pay debts. The sale was announced as being made free of encumbrances, and the property was struck off at \$2,900, and the sale confirmed by the court. Afterward, the purchaser refused to comply with his bid, because a sewer assessment and two judgments against former owners of the premises were liens thereon. The assessment was paid off before, but the judgments not until after, the expiration of the time for completing the sale. The administratrix then obtained an order vacating the confirmation order, re-advertised the property and tried, without success, to sell it again; she also petitioned the court for directions in the premises, but this petition was dismissed.—*Held*, (1) that she was not chargeable with the \$2,900; (2) that her petition for directions was properly dismissed. *Wanzer v. Eldridge*, 511
8. An executor is justified in paying the funeral expenses of an indigent sister of the testator, for whose use for life the income,

Executors and Administrators—Continued.

- and, if necessary, the principal, of one-half of his residuary estate had been given. In such case the funeral expenses are necessities. *Wilson v. Staats*, 524
9. An executor's investment on a first mortgage on lands, worth, at the time, one-third more than the amount loaned, approved, although loss to the estate subsequently happened; an investment on a second mortgage, exceeding, with the first mortgage, two-thirds of the value of the premises, condemned. *Id.*, 524
10. An executor holding a bond and mortgage of one who makes an assignment for the benefit of his creditors, and whose estate pays a dividend, is in laches in not presenting the claim on the bond to the assignee. *Id.*, 524
11. *Semble*, an executor who resells lands bought in by him on foreclosure of mortgages of the estate, need not advertise as on a public sale under the statute. *Id.*, 524
12. Commissions allowed, no bad faith being shown. *Id.*, 524
13. Any person interested in an estate as creditor, or otherwise, has a right to file exceptions in the orphans court to the account of a discharged or removed administrator. *Poulson v. National Bank of Frenchtown*, 618
- See ASSIGNMENTS, 3; LEGACY, 2; PARTITION, 1.*

F.**Fraud.**

1. A willful misrepresentation as to the income derived from the royalty on a certain patent, which induced a land-owner to exchange his property for a one-half interest in such royalty, is sufficient evidence of fraud and deceit to set aside the conveyance. *Crosland v. Hall*, 111
2. Fraud perpetrated by means of a judgment is entitled to no more immunity than a fraud perpetrated by any other means. *Mechanics National Bank v. Burnet Manufacturing Company*, 486
3. If a judgment, founded upon a just debt, is entered not for the purpose of securing or collecting the debt, but for the purpose of being used as a cover, to protect the defendant's property from his other creditors, the court will denounce it as a fraud and set it aside, as it would any other fraudulent contrivance. *Id.*, 486

See EVIDENCE, 3; SET-OFF.

Frauds and Perjuries.

1. A devise of rents arising out of the residue of the testator's real estate, which the executors were authorized and directed to sell, is an interest in lands within the statute of frauds, and its transfer must be evidenced by a note or memorandum signed by the party to be charged therewith. *Brown v. Brown*, 650

Frauds and Perjuries—Continued.

2. The assignment in this case cannot be regarded as the written memorandum required by the statute of frauds, because it was not delivered. *Id.*, 650

Fraudulent Conveyances.

1. Mortgaged premises were sold, and a decree for deficiency taken against the mortgagor. Thirteen days before such sale, the mortgagor conveyed all his lands, valued at \$50,000, to his two sons, one of them a minor, in satisfaction of an alleged indebtedness of \$8,000 to them, no other debts being shown.—*Held*, fraudulent as against the mortgagee. *Hoboken Bank for Savings v. Beckman*, 53
2. Any one liable on a contract, express or implied, though only contingently liable, is a debtor, within the meaning of the statute of frauds, from the date of his contract. *Schmidt v. Opie*, 138
3. All that a judgment creditor need do, who seeks the aid of a court of equity against his debtor's land, is to show a judgment at law creating a lien thereon; but if he seeks aid in respect to his debtor's personal estate, he must show not only a judgment, but that an execution has been issued. *Id.*, 138
4. On an agreement for the sale of land being made, the purchaser becomes, in equity, the owner of the land, and the vendor becomes the owner of the purchase-money. *Id.*, 138
5. If a mortgagor executes a mortgage for a fraudulent purpose, and the mortgagee accepts it, with knowledge of the mortgagor's purpose, intending to aid him in such purpose, the mortgage will be held void as to those who are defrauded by it, even if it is founded on a perfect consideration. *Id.*, 138
6. It is no objection to a petitioner's right to set aside a voluntary conveyance of lands, made to defeat a personal decree for deficiency on a foreclosure, that at such foreclosure sale the mortgaged premises were bought by the petitioner (the mortgagee) at much less than their actual value, where no fraudulent or inequitable conduct on the petitioner's part is shown. *Bohde v. Lawless*, 412

See ASSIGNMENTS, 2, 3; SETTING ASIDE SALES, 2.

Funeral Expenses.

See EXECUTOR, 8; PARENT AND CHILD.

G.**Guardian.**

1. Upon the application of the widow of a decedent and of the guardian of his minor children, and upon their promise to repay him out of the rents of the property, the complainant, in order to save the *real* property of the estate from a forced sale, advanced

Guardian—Continued.

money sufficient to pay those creditors of the estate who had proved their claims. Afterwards, and upon their like solicitation and promise, he advanced further sums of money to pay interest on a mortgage on the property and to make necessary repairs. Only a small portion of such advances having been repaid, he demanded the balance of the guardian, who thereupon gave him a power of attorney to collect the rents and appropriate them in satisfaction of his claims, such power acknowledging that his debt was for money advanced for the benefit of the property, and to protect it from a public sale. He collected a small amount, and then the guardian, without assigning any reason, refused to allow him to collect any more rent. The guardian filed an account in the orphans court, but omitted complainant's claim therefrom, and an exception on that account by the complainant was dismissed. After demanding payment of the widow and guardian, complainant filed a bill against them for payment of his claim, and, if the assets should be insufficient, that the amount due or the deficiency might be charged on the lands. On demurrer—*Held* (the power of attorney being still in existence), that equity would aid complainant in obtaining payment of his debt by the collection of the rents under the power, until fully re-imbursed. *James v. Lane*,

30

2. A guardian was held liable for the amount of a promissory note given by him to his ward's mother, and after her death taken into his own custody ostensibly for safe keeping, such note being found after his death among his effects, with his signature torn off, and also for the proceeds of sale of certain furniture, which also belonged to the ward's mother, and was sold at auction by him; and it was held to be no defence that no administration of the mother's estate was ever taken out; both the note and the furniture having been taken by the guardian, as such, into his possession. *McGill v. O'Connell*,

256

H.**Highway.**

See CORPORATION, 13-16; MUNICIPAL CORPORATION, 1.

Horse Railroads.

See CORPORATION, 13-16.

Husband and Wife.

1. A bill to establish a resulting trust averred merely that C. (the husband) was married to K. in 1827, and that lands were conveyed to him in 1831, but that the consideration therefor was paid by the wife "out of her own estate."—*Held*, insufficient. The court cannot infer, from such averment, that the wife had a separate estate, and that the consideration for such land was paid

Husband and Wife—Continued.

therefrom, or for its benefit. As the law stood at her marriage, her property, other than her separate estate, vested in her husband, and even if the money was her separate estate, she may have given it to her husband. *Joyce v. Haines*, 99

2. By the common law, when lands become vested, during coverture, in husband and wife, the husband is entitled to the exclusive use and possession of them during their joint lives. *Kip v. Kip*, 213

3. This rule, so far as it excludes a wife, during coverture, from the enjoyment of property thus held, was abolished by the statute of 1852, securing to married women the use of their separate property. *Id.*, 213

See DIVORCE.

I.**Infant.**

See ESTOPPEL.

Injunction.

1. A foreign corporation, without any authority whatever, laid a pipe for transporting oil on the bottom of a navigable river, on lands belonging to the state, and underneath a draw-bridge of complainant. At that point the channel was so deep and wide as that the laying of the pipe there would not interfere with the bridge. A preliminary injunction to prevent such pipe-laying was denied, because, (1) The pipe had been laid before the application for the injunction was made. (2) The lands where the pipe crosses the bridge belong to the state, and the complainants have no legislative authority to reclaim them. (3) The pipe, as laid, does not interfere with or obstruct the maintenance and operation of the draw-bridge nor any lawful filling. (4) The complainants' franchise of carrying oil is not exclusive, and therefore does not prevent any other company from doing so, if not in contravention of the company's franchise, much less so when it appears the defendants intend to transport only their own oil. *United Co. v. Standard Oil Co.*, 123
2. After complainants had constructed their railroad tracks through a city, part of the lands which its tracks traversed was condemned by the city, in order to cross them with a street. This necessitated a bridge, which was sixteen feet above the tracks. The bridge, although built by the company, was paid for by the city. Subsequently, the defendants, by virtue of a resolution passed by the city authorities, laid a pipe for transporting oil along and underneath the surface of the street, and crossed complainant's tracks at and on a level with, and alongside of, the bridge. A preliminary injunction to prevent such crossing, applied for by the railroad company and its receiver

Injunction—Continued.

appointed by this court, was refused, because: (1.) The pipe had been laid before the application for the injunction was made. (2.) To justify its allowance, there is shown no irreparable injury, either from leakage of the oil to be transported, which is highly inflammable, or interference with the elevation of the bridge, if complainants desire to raise it. (3.) The complainants have no monopoly in carrying oil, and hence cannot object to lawful competition. (4.) No contempt towards this court appears by defendant's action. *Central R. R. Co. v. Standard Oil Co.*, 127

3. If the equity judge has allowed an interlocutory injunction, which afterwards clearly appears to him to have been improperly allowed, he may, of his own motion, set it aside at any time without any notice having been given of an application to dissolve. The statute, requiring eight days' previous notice of a motion to dissolve an injunction, has reference to applications to dissolve made by a party. But, on appeal from an order of dissolution, made under such circumstances, the appellate court will consider only the reasons assigned in the court below, for its judicial action. *Conover v. Ruckman*, 303
4. An injunction will not be dissolved merely because the complainant, in his bill, has unintentionally misstated some of the facts on which his claim to relief is founded, such misstatements not affecting the merits. *Frome v. Freeholders of Warren*, 464
5. Lands condemned by a municipal corporation and in public use for a street before payment of award of damages, will not, at the instance of the owner, be restrained in their use by injunction, where a remedy at law exists, either by ejectment or by suit for the award. *Jersey City v. Gardner*, 622

See APPEAL, 2; CONTRACT, 2; EASEMENTS.

Insanity.

1. When no fraud is alleged, and where incapacity is the ground on which a deed is sought to be set aside, the test is, had the grantor sufficient mind to comprehend, in a reasonable manner, the nature and effect of what he was doing? *Blakeley v. Blakeley*, 502
2. A suitor who seeks to set aside a deed on the ground of incapacity, must do something more than show insanity; he must show that the transaction he seeks to invalidate was affected by the grantor's derangement. *Id.*, 502
3. A deed made by a person of non-sane mind, before unsoundness is established by inquisition, is not void, but merely voidable, and may be confirmed in lucid intervals so as to be unimpeachable. *Id.*, 502

See DIVORCE, 11; WILLS.

Insolvency.

See ASSIGNMENTS, 3; CORPORATION, 12.

Interest.

See CORPORATION, 12; DOWER; EXECUTORS, 2.

J.**Jurisdiction.**

1. To compel the surrender and cancellation of written instruments, which have spent their force and are mere nullities, but which, left in an uncanceled state, may becloud a title, or be used for dishonest purposes, is an ancient and well-established head of equity jurisprudence. A court of equity will assume jurisdiction and compel the surrender of the instrument, or limit its use to such purposes as may seem to it to be equitable, when a suit at law is already pending, if it shall appear that it is doubtful whether the instrument may not be used, in such suit, for a dishonest or inequitable purpose. *Foley v. Kirk*, 170
2. The question whether a deed was intended, by the parties thereto, to operate as a mortgage or as an absolute conveyance, is one that a common law court can neither hear nor determine. It is a question belonging exclusively to equity tribunals, and over which common law tribunals have no jurisdiction whatever. *Id.*, 170
3. Equity deals with equitable estates as though they were legal estates. *Kip v. Kip*, 213
4. The orphans court has no power to relieve a creditor on the ground that his omission to file his claim in due time arose from his mistake, and not from mere negligence. *Ellison v. Lindsay*, 259
5. On a bill filed for the reformation of the bond of the treasurer of a society, because seals were omitted therefrom, and for a decree fixing the amount due thereon from the treasurer and his surety—*Held*, that while the bond could be reformed as to the seals, no decree could be granted for the amount due thereon, because the remedy at law was adequate, and a demurrer on the latter ground was sustainable. *Red Jacket Tribe v. Hoff*, 441
6. Objections which relate to the regularity of a judgment at law, or to the validity of the instrument upon which it is founded, are not relievable in equity. *Mechanics National Bank v. Burnet Man. Co.*, 486
7. The remedy for grievances of this character is either by application to the court in which the judgment is entered, or by writ of error. *Id.*, 486
8. A judgment at law can only be impeached in a court of equity for fraud in its concoction, or upon a purely equitable defence, or upon the ground that a good defence at law has been lost by fraud, ignorance or accident. *Id.*, 486
9. The claim in this case held to be an equitable one, and one which, being equitable, and also for an unliquidated amount, could not be enforced by *mandamus*. *Allen v. Williams*, 585

Jurisdiction—Continued.

10. Rights which inhere in the party seeking aid in court, must determine the jurisdiction, and not those of the defendant. *Jersey City v. Gardner*,

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L.**Laches.**

See SPECIFIC PERFORMANCE, 1, 2; ESTOPPEL; INJUNCTION, 1, 2
PLEADING, 8; SETTING ASIDE SALES, 3.

Legacy.

1. A parent gave testamentary power to her executors to sell a certain house and lot, and to set apart \$3,000 of the amount derived therefrom for the sole and separate use of her daughter Julia (the wife of C.), who was to receive the interest and income thereof during her natural life, and at her death it was to be paid to the persons who at that time might be her heirs at law; and further provided that, if Julia should so elect, the fund might be invested in a house and lot, which she might select, and which should be conveyed to her; with a further declaration that Julia should enjoy the same free from the control of her husband. Testatrix's house and lot have been sold. Julia's husband is dead, and on bill to compel the executors to pay over to her absolutely the \$3,000—*Held*, that since Julia could require the executors to purchase a house and convey it to her, for her sole and absolute use and disposition, she is entitled to have the \$3,000 paid to her directly and absolutely. *Courter v. Howell*, 80
2. A testator gave the interest on certain funds, which were to be securely invested on bond and mortgage, to his wife for life or widowhood, for the support of herself and their son, with a proviso that on her remarriage, her right to such interest should cease, and it should be payable for the support of the son only; and if she should remain unmarried until the son attained his majority, he should be entitled to one-half of the income for his own use; and that at her decease all the estate should go to the son absolutely, so soon as he should marry or become of age, but if he should die without heirs, or before he came into full possession, then over. The widow and two others were appointed executors. The testator died in 1840, and his widow, who, with one of the other appointees, proved the will, remarried in 1847. In 1848, the executors who proved the will filed their final account, and invested the fund as directed by the will, until its repayment to the executor in 1873, when it was invested in first mortgage on city lots, then worth three times as much as the fund invested. Afterwards, the mortgagor became insolvent, and the executor, on foreclosure, was obliged to buy in the property, in order to protect the fund. The son came of age in 1860. He was married to complainant in 1858, and died in 1864, leav-

Legacy—Continued.

- ing a child born of the complainant in 1860, who is still living.—*Held*, (1) On construction of the will, that the son was entitled to the entire estate on the remarriage of the widow, and the gift over was defeated by the son's leaving lawful issue surviving at his death.—*Held*, also, (2) That the executor's discretion as to the security of the investment in 1873 appearing to have been fairly exercised, and he having obtained advice from reputable counsel that the principal of the fund did not go to the son unless he survived his mother, he is guilty of no breach of trust, either because he continued to hold the fund after the gift over was defeated, or because of the investment in 1873, and that the land is the fund. *Perrine v. Vreeland*, 102
3. Where a parent bequeaths a legacy to a child it is understood to be a portion, and if, after the execution of the will, the parent gives a sum of money to the child, equal in amount to the legacy, if it be, *ejusdem generis*, it will be an ademption of the legacy, if so intended. *Van Houten v. Post*, 344
 4. The advancement of a less sum, with intent to go on the legacy, will be an ademption *pro tanto*. *Id.*, 344
 5. Evidence of parol declarations of testator of the fact of giving the money is not admissible, but such fact must be proved by other testimony. *Id.*, 344
 6. Charges in books, made by parent against child, to show advancements, admitted in evidence; such testimony having been so long received by the courts of this state. *Id.*, 344
 7. The fact of the money having passed from the parent to the child being proved, it will be presumed to be in satisfaction of the legacy; but the presumption will be slight, and evidence of parol declarations of testator that he did not so intend, and also his declarations in reply thereto that he did so intend, are admissible. *Id.*, 344
 8. Whether intended to be a gift, independent of the legacy, or the payment of a debt, or a portion in ademption of the legacy, is to be decided by the circumstances and facts proved in each case. *Id.*, 344
 9. A testator gave to his wife the use and income of his house and lands, for her life, and directed his executors to supply her out of his estate with everything that she might need or desire for her comfort, sustenance and happiness. He then gave a specific legacy to S.; several pecuniary legacies to others, and devised his house and lands, after his widow's death, to the trustees of a church, as a parsonage, on certain conditions.—*Held*, (1) That the executors must resort to the principal of the personalty, for the widow's support, if the income thereof be insufficient. (2) That the payment of the general legacies must be postponed until after the widow's death, and would be subject to ratable

Legacy—Continued.

- abatement if there should be a deficiency. (3) That the specific legacy must be paid now, and without abatement. *Bonham v. Bonham*, 476
10. A court of equity will give effect to an assignment of an expected legacy executed in the lifetime of the testator, if made for a valuable consideration. *Bacon v. Bonham*, 614
11. In such case, absence of fraud, good consideration and adequacy of price, should be proved, affirmatively, by the party claiming the benefit of the assignment. *Id.*, 614

Lien.

1. A statutory lien on lands for annual water-rents cannot be extended by construction so as to include water furnished by the city commissioners under a contract with a tenant for years; and hence a sale of the premises occupied by such tenant, for default in paying such water-rents, is *ultra vires*, and may be set aside on application of the owner. *Carpenter v. Hoboken*, 27
2. A prior mortgage to "S. & Co., a firm composed of T. S. and J. S.," will be postponed to a subsequent one given to secure a loan made upon the strength of an agreement of J. S., surviving partner, and one of the executors of T. S., deceased, to the effect that the lender's lien should be preferred. *Mut. Life Ins. Co. v. Sturges*, 328

See CORPORATION, 12; FRAUDULENT CONVEYANCE, 3; MUNICIPAL CORPORATION, 2; PARTITION, 1; TAXES, 2.

M.**Marshaling Assets.**

1. On marshaling the assets of both partnership and individual estates, under separate assignments for the benefit of creditors, the partnership creditors are not entitled, after exhausting the partnership assets, to resort to the individual assets until after the individual creditors' claims have been satisfied. *Davis v. Howell*, 72
2. An ancestor bought certain lands, and, by his deed, assumed to pay a mortgage thereon, and its amount was allowed to him as so much of the purchase-money. *Held*, that this was not such a personal assumption of the mortgage as entitled the heir, to whom the premises descended, to exoneration out of the personal estate for the amount of the mortgage. *Mount v. Van Ness*, 262
3. Where there are three encumbrances on the same property, the first of which is entitled to priority over the second, but is subordinate to the third, which is subordinate to the second, they will be marshaled as follows: the third, if it be for as large a sum or a larger sum than the first, will be paid to the extent of the

Marshaling Assets—Continued.

sum secured by the first; then the second encumbrance will be paid in full if the property is sufficient, and then the residue to the third, if there be a residue; and then the first encumbrance will come in. The principle of *Clement v. Kaighn, & McCart*, 48, approved and developed. *Hoag v. Sayre*, 552

4. A took a chattel mortgage for \$2,150 and failed to record it; B, with knowledge of the first mortgage, took a second one for \$1,160; C obtained a judgment for \$3,000 on the same day with the second mortgage, and made a levy.—*Held*, that C had the first lien to the extent of \$2,150, the amount of the first mortgage; then that the residue of the judgment and the second mortgage should be paid *pari passu*, and, lastly, that the first mortgage should come in for payment. *Id.*, 552

See LIEN, 2.

Maxims.

<i>Jus dicere, non dare,</i>	187
<i>Omnia præsumuntur contra spoliatores,</i>	257
<i>Nemo est hæres viventis,</i>	47
<i>Vigilantibus non dormientibus jura subveniunt,</i>	21

Mines.

See WASTE.

Mortgage.

1. A statute requiring mortgages to be registered, or to lose their priority as against subsequent judgment-creditors, or *bona fide* purchasers or mortgagees of the same premises, without notice, applies to a mortgage given to the state. A suit for the foreclosure of a mortgage given after, but registered before, one given to the state on the same lands, is a suit "arising out of any previous lien or encumbrance" (*Rev. 1223*), to which the state may be made a party, and have its rights in the premises determined. *Clement v. Bartlett*, 43
2. In determining the question whether a deed, absolute on its face, is what it purports to be, or a mortgage, the fact that the parties, after the execution of the deed, still understood that the relation of creditor and debtor continued, in respect to the debt on which the deed is founded, must generally be regarded as decisive in showing that the instrument was intended to be a mortgage. *Budd v. Van Orden*, 143
3. The only infallible test of the value of a merchantable article is what it is actually sold for at a fair sale. *Id.*, 143
4. A mortgagee in possession, holding under a deed absolute on its face, who sells the mortgaged premises, is bound to account to his mortgager at the price at which he sold, though he may be able to show, by the opinion of competent judges, that such price is in excess of their market value. *Id.*, 143

Mortgage—Continued.

5. In ascertaining the sum for which a decree for deficiency should be made, the sum for which the mortgaged premises were sold must, so long as the sale stands, be taken, as between the parties to the suit, as a conclusive test of the value of the mortgaged premises. *Snyder v. Blair*, 208
6. On such an inquiry, the court is not at liberty, in case the market value of the premises happens to exceed the sum realized at the sale, to deduct the market value and enter a decree only for the balance of the mortgage debt. *Id.*, 208
7. A bond and mortgage belonging to a husband were assigned by him to one S., and by S. immediately re-assigned to the wife; both assignments were duly acknowledged, and that to S. recorded, by the husband's direction, but the bond and mortgage and both assignments remained in the husband's possession, except once afterwards when the mortgage was delivered to the wife for a temporary purpose and then returned by her to her husband. There was no consideration for the transfer.—*Held*, that as there was no delivery of the bond and mortgage and assignment to the wife, the title thereto never passed to or vested in her. *Ruckman v. Ruckman*, 354
8. Two mortgages were given, one in 1854 and the other in 1855, and duly recorded, to H., who died in 1874, and gave them to his daughter M. In 1879, M. asked of the mortgagor, who then owned the mortgaged premises, an acknowledgment that the mortgages, on which nothing had ever been paid, were still valid securities, to which the mortgagor agreed, and, in the presence of a witness, signed such an acknowledgment, endorsed on each mortgage. Afterwards the mortgages were assigned by M. to the complainant, who sent them to the mortgagor to obtain his admission as to the genuineness of his signature (his mark), and the mortgagor thus obtained possession of them, and ever after professed to be unable to find or produce them.—*Held*, that the acknowledgment destroyed the presumption of payment from lapse of time as to the mortgagor, and that, as to a second mortgagee—such mortgagee had such constructive notice from the record, where the mortgage was uncanceled, as to put him on inquiry, and that the proof in the case showed, outside of the acknowledgment, that the mortgages had never been paid. *Murphy v. Coates*, 424
9. A *bona fide* release of an assumption of a mortgage was verbally agreed upon before suit brought to foreclose the mortgage, but the release was not executed until after suit brought. Without knowledge of the existence of the suit, it was executed and the consideration paid.—*Held*, to discharge the assumption. *O'Neill v. Clark*, 444
10. Where a person took an absolute conveyance, but which was, in

Mortgage—Continued.

point of fact, a mortgage, and sold the premises as his own, repudiating the interest of the grantor, and took a mortgage for part of the consideration money—*Held*, that it was not inequitable to charge him, in his accounts with the grantor, with the amount of the money secured by the mortgage taken by him, as so much cash in hand. *Van Orden v. Budd*,

564

See AGENT, 2; DOWER; EVIDENCE, 5; EXECUTORS, 5; JURISDICTION, 2; MARSHALING ASSETS, 2; PARTIES, 2; SET-OFF; USURY; CONSTITUTION, 2; MUNICIPAL CORPORATIONS, 2; TRUSTS, 3.

Municipal Corporation.

1. Complainant moved back a fence along a public street, and threw out a strip of land six feet in width, thereby rendering the street more dangerous for travel, by throwing a ditch running along the fence nearer the centre of the street. Thereupon the street commissioners began to cut away part of the strip of land, in order to alter the ditch and render the passage of the street safer.—*Held*, that complainant could not enjoin the acts of the commissioners in that matter, because (1) if he had dedicated the strip of land, the commissioners had authority (under the act for "the improvement of Somerville") to improve it; and (2) if he had not dedicated it, such injury was not irreparable, and he could obtain adequate redress at law.—*Held*, also, that since such commissioners had power to remove encroachments on highways only by resolution or ordinance, their threatened removal of complainant's fence so as to add to such highway an additional strip of land from five to nine feet wide because of an alleged encroachment to that extent, without any official direction by resolution or ordinance, and without first ascertaining whether there was an actual encroachment, the complainant and his grantors having been in quiet possession of the premises for thirty years, might be enjoined. *Doughty v. Somerville*,

1

2. Under the charter of the city of Rahway, adopted in 1865, the lien of the city for ordinary municipal taxes and for assessments for street improvements, is prior to a *bona fide* mortgage on the premises made and registered before the levy or assessment. *Thompson v. Thorp*,

401

3. The supplement to the charter of the city of Newark, framed April 15th, 1868 (*P. L. of 1868 p. 1002*), construed, and held to be constitutional. *Smith v. Newark*,

545

See INJUNCTION, 2; PARTIES, 1; PLEADING, 2.

N.**Notice.**

See INJUNCTION, 3; MORTGAGE, 8.

O.

Orphans Court.

See EXECUTORS, 13; JURISDICTION, 4; PRACTICE, 2.

Parent and Child.

1. Where appellant took into his own family an orphan, and educated and supported her until she was sixteen years old, when she went elsewhere to work, and received her own earnings for a time, but becoming sick she returned—*Held*, that appellant was entitled to recover from her estate the expenses of her last illness and funeral. *Aliter*, as to clothing and board furnished. *Schaedel v. Reibolt*,

534

See LEGACY, 3-8.

P.

Parties.

1. Where the authority of commissioners is terminated by their assessment and return to the common council, they are unnecessary parties to a suit to set aside a sale of lands ordered by the common council and predicated on their proceedings. *Carpenter v. Hoboken*,
- 27
2. The omission of the assignor as a party to a foreclosure by the complainant (who held the mortgage as collateral), no objection on that ground being raised by the answer, and no necessity for his being made a party appearing, could not be set up at the hearing. *Stevens v. Reeves*,
- 427
3. A defendant to a creditor's bill, after having been admitted as a co-complainant, may have the conduct of the cause committed to himself, on the ground of great delay on complainant's part, and on terms as to indemnifying complainant against future costs in the cause. *Thompson v. Fidler*,
- 480
4. A party who, having acquired an interest during the pendency of the suit, applies, under the chancery act, to be made a party in order to move to open the decree, must present, in his petition, a case of substantial equity. *Id.*,
- 480
5. Claiming in the court below the right to be let in as a party for a specified purpose, he cannot object, on appeal, to the order refusing his admission, that he had the right to be joined to the suit for another purpose. *Davis v. Sullivan*,
- 569

See AGENT, 1; APPEAL, 1; CONTRACT, 1; DOWER; MORTGAGE, 1.

Partition.

1. A testator gave his homestead farm to three of his children equally, and further gave legacies to his widow in lieu of her dower, "secured on good freehold security, and the interest thereof paid half-yearly to her;" and also the interest on a legacy to a

artition—Continued.

daughter for life. He then, after the payment or securing of the above-named legacies, gave all the residue of his estate, including the remainders of the legacies, to the three first-named children. One of them and a person not of the family were the executors. They had never filed any account. On a bill for a partition of the farm by such executor—*Held*, (1) that the legacies were charged on the whole farm, and the amount due thereon ought to be ascertained before a sale was ordered on partition; (2) that the complainant, who, by purchase from his brother, since testator's death, had acquired another third of the farm, and had occupied it since then, could not be called to account by the defendant, for the one-third of the proceeds of the farm during his occupancy, without a cross-bill; (3) that since the amount of the personal estate, and the extent of the deficiency thereof to satisfy the debts and legacies, did not appear, a sale would not be ordered until after the executors have settled their account in the orphans court. *Adams v. Beideman*,

77

2. Complainants bought lands adjoining their factories in 1879. The title to an interest therein (supposed to be one-sixth) was in some doubt, but no claimant therefor had appeared since 1846, and they were assured that their title to the whole was good. In order to fortify their title, they took a transfer of a declaration of sale of the premises for taxes, made in 1869. Afterwards they contracted for the erection of buildings and machinery on the lands, to be used in connection with their other works, and erected the buildings thereon accordingly. On a bill *quia timet*, filed by them to quiet their title to the before-mentioned interest, certain claimants appeared, and the proceedings in that suit were dismissed as to them. On a bill for partition—*Held*, that the circumstances of the case were not such as to deprive complainants of the right to equitable partition between them and the owners of the interest. *Atha v. Jewell*,

417

See SETTING ASIDE SALES, 3.

artnership.

See LIEN, 2; MARSHALING ASSETS, 1; USURY, 4.

ayment.

See AGENT, 2; MORTGAGE, 8.

leading.

1. To a judgment-creditor's bill to set aside a conveyance of lands, alleged to be fraudulent as against such creditor, to which the grantor (the debtor), his wife and their grantee were made defendants, the wife did not demur, as she might have done, but filed a plea setting forth a sheriff's sale and conveyance of the

Pleading—Continued.

- premises to her, under an execution issued out of this court against her husband and another, before the alleged fraudulent conveyance.—*Held*, on argument of the plea, that it is not good, because it does not set out any order or decree on which the execution issued. *Wesling v. Schraas*, 42
2. Where, on a bill to remove cloud from title, arising from a municipal assessment and sale thereunder, it was averred merely that the city was made a party to a suit for foreclosure of a mortgage on the premises, and a decree obtained therein, and the premises sold—*Held*, on demurrer, that such decree and proceedings do not bar the city from selling such premises under a valid assessment, where it is not alleged that such mortgage was prior to the assessment, or that the assessment was attacked or called in question in the foreclosure suit, or the city called on to redeem because the assessment may have been paramount to the mortgage. *Dickinson v. Trenton*, 63
3. In 1868 and 1869 the New Jersey Western Railroad Company, acting under legislative authority, constructed parts of a railroad in this state, and the complainants and others subscribed and paid for its stock. In 1870 it was consolidated with other railroads, built or to be built, by an act authorizing compensation to such stockholders of the New Jersey Western as were dissatisfied therewith. A mortgage, covering all the property of the consolidated roads, was given, and the legality of the consolidation recognized by subsequent legislation. Against some of the defendants there appeared to be some grounds for applying for relief.—*Held*, that it cannot be satisfactorily determined, on the statements of the bill, whether the complainants have, by acquiescence, lost their rights as stockholders, and the demurrer, being too general, was overruled. *Hoxsey et al. v. New Jersey Midland Railway Co.*, 119
4. A material and controlling fact, which is clearly and fully averred in the bill and not denied or alluded to in the answer, must be taken as confessed. *Pumell v. Boyd*, 190
5. A bill which fails to make a case, which if omitted or proved will entitle the complainant to a decree, must be held bad on general demurrer. *Kip v. Kip*, 213
6. In equity pleadings, such degree of certainty should be adopted as will give the opposite party full information of the case he is called upon to meet. *Id.*, 213
7. At or after final hearing, it is too late to object to mere want of precision in the bill. *Id.*, 213
8. A bill alleging that a contract about a mortgage given to S. & Co., was made by that firm or their survivors and legal representatives, and setting out who are the surviving partner and leading

Pleading—Continued.

representatives of the deceased, and making them defendants, is not so vague as to justify the vacation of a decree based upon the contract, especially after the decree has been executed. *Mutual Life Ins. Co. v. Sturges*,

328

9. Where a bill alleged that a deed was given merely to secure a debt, and the answers admitted that the grantors made a certain deed in writing, of such date and of such purport and effect as in the bill mentioned and set forth—*Held*, not to be such an admission of the nature and effect of the deed as to preclude all inquiry on the subject. *Brown v. Balen*,

469

See EXECUTORS, 1; HUSBAND AND WIFE, 1; INJUNCTION, 4; PARTITION, 1; SETTING ASIDE SALES, 3.

Possession.

See GUARDIAN, 2; HUSBAND AND WIFE, 2, 3; MORTGAGE, 4, 10.

Post Office.

See ASSIGNMENT, 1.

Powers.

See CORPORATION, 4-6; TRUSTS, 5.

Practice.

1. A bill may be dismissed at the hearing, without reference, if, on the pleadings and proofs, the court can then decide the question. *Tillotson v. Gesner*,

313

2. Where a contest over the probate of a will has been duly certified into the circuit court, and the proceedings there appear to have been regular, and the verdict of the jury properly certified into the orphans court and a decree in conformity with the verdict entered, objections addressed to the discretion of the circuit judge and overruled by him, or objections which, if raised at all, ought to have been raised in the circuit, are no ground for reversing the decree of the orphans court. *Youmans v. Petty*,

532

See EXECUTORS, 7; INJUNCTION, 3; SETTING ASIDE SALES, 1; USURY, 2; PARTIES, 3.

Prerogative.

See MORTGAGE, 1.

Presumption.

See CANCELLATION, 2; LEGACY, 7; MORTGAGE, 8.

Q.**Quia Timet.**

See PLEADING, 2.

R.

Railroads.

See CONSTITUTION, 1; CORPORATION, 13-16.

Ratification.

See INSANITY, 3.

Receiver.

1. Exceptions to a master's report on the accounts of a receiver appointed by this court, involving his management and disposal of the trust property, and the amount of his compensation, considered and overruled. *Woolsey v. Cummings Car Works*, 432

See CORPORATION, 1-3.

Reformation of Instruments.

1. Deed reformed by striking out an assumption of a mortgage inserted through the mistake of the scrivener, and accepted by the grantee in ignorance thereof. *O'Neill v. Clark*, 444
2. Complainant held a mortgage on an undivided two-thirds interest in certain lands, to secure debts owing to him by the two holders of that interest. To induce the owner of the remaining third to join in an absolute conveyance of the premises to him, he agreed to personally assume two prior mortgages thereon.—*Held*, that he could not afterwards have such assumption expunged from his deed, on the ground of fraud or mistake, and have such deed declared to be a mere security for the payment of the debts of the two grantors. *Brown v. Balen*, 469

See JURISDICTION, 5.

Rules.

148 and 149, 374

S.

Sale of Chattels.

See EXECUTORS, 6; MORTGAGE, 3.

Sale of Lands.

1. A sale under a decree obtained in this court cannot be attacked collaterally by setting up that the solicitor who acknowledged service of the subpoena on the party affected by it in the suit in which the decree was made had no authority to do so, nor that the ticket accompanying the subpoena did not apprise such party of the ground on which he was made defendant to the suit. *Dickinson v. Trenton*, 63

See EXECUTORS, 7, 11; FRAUDULENT CONVEYANCE, 6; USURY, 5.

Setting Aside Sales.

1. A sale under a decree in chancery may be set aside, even after deed delivered, by an order made in the original cause, either for impropriety in the sale, or for the purpose of letting in a defence to the action. *Mut. Life Ins. Co. v. Sturges*, 328
 2. A judgment creditor may set aside a sheriff's sale of mortgaged premises when the mortgage was fraudulently given by the judgment debtor to protect his property, for an amount greater than he owed, and the creditor was deterred from bidding at the sale, which was under prior judgments, by the fact that the amount of the fraudulent mortgage, with those judgments, amounted to more than the value of the premises. *Bentley v. Heintze*, 405
 3. A petition to set aside a master's sale in partition was dismissed, where an application to the master to adjourn the sale was made after the sale had begun; the price obtained for the premises was satisfactory; the master's discretion as to selling nine lots in gross, fairly exercised, and the petitioner was in laches in presenting his petition. *Thorne v. Andrews*, 457
 4. A sheriff's sale made by virtue of process issuing out of this court, may be set aside on petition, and without bill, even after the sale has been carried into effect by the delivery of a deed. *Mut. Life Ins. Co. v. Goddard*, 482
 5. A person whose property has been sold at judicial sale, to his injury, may always, if he applies promptly, and is without fault, have the sale set aside upon showing that he was prevented from attending the sale by fraud, mistake or accident. *Id.*, 482
 6. A sale made in violation of a promise to adjourn to a future day will be set aside. *Id.*, 482
- See* APPEAL, 1; LIEN, 1.

Set-Off.

1. The vendee of land cannot claim, in a foreclosure suit, a deduction from the mortgage-money, on the ground that his vendor, who was not the mortgagor, misstated the number of acres of the land conveyed, and that the vendor of such vendor, who was the mortgagee and complainant, when he sold such lands, made a similar misstatement. *Davis v. Clark*, 579
2. To authorize such deductions, the mortgagee and the owner must be privies in contract. *Id.*, 579
3. A sold a farm to B, misstating the number of acres, taking a mortgage for part of consideration. B sold, making a similar misstatement, to C, who assumed payment of the mortgage.—*Held*, on a foreclosure by A, that C could not set up these facts in order to offset his damages against the mortgage. *Id.*, 579

Solicitor.

See COSTS, 1, 5, 7; SALE OF LANDS.

Specific Performance.

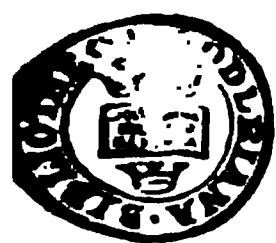
1. Great delay in seeking relief is a good bar to a suit for specific performance. *Johnson et al. v. Somerville*, 152
2. Sixty years' delay constitutes a bar. *Id.*, 152
3. A suitor asking a court of equity to give him the benefit of the exercise of its discretionary power, must show a good conscience, good faith and reasonable diligence. *Id.*, 152
4. Where there is a conveyance of land, voluntary on its face, made by a defendant in a suit just before a judgment for a large sum is rendered against him, which would be a lien on the land if such conveyance had not been made, and the evidence fails to show, by strong proof, that it was made in good faith and for a valuable consideration, the specific performance of an agreement with the vendee for the purchase of the land will not be enforced. *Tillotson v. Gerner*, 313
5. If the title to land be doubtful, equity will not compel the defendant, in a bill for specific performance, to expose himself to the hazard of litigation. *Id.*, 313
6. The specific performance of contracts is a mode of redress grounded upon the impracticability or inadequacy of legal remedies to compensate for the damages which the party seeking it will suffer by the default of the other in keeping his bargain. *Brown v. Brown*, 650
7. It is only when the remedy at law will not put the party in a situation as beneficial to him as if the agreement were specifically performed that equity will interfere. *Id.*, 650
8. Where jurisdiction exists, the remedy is not of right; the court holds it in judicial discretion, controlled by principles of equity and justice. *Id.*, 650
9. The bargain or promise to be enforced, whether written or verbal, must possess, in substance and external form, the requisites of a valid contract. *Id.*, 650
10. It must have been completely determined between the parties, and its terms definitely ascertained. *Id.*, 650
11. So long as negotiations are pending over matters regarded by the parties as material to the contract, and until they are settled, and the minds of the contracting parties meet upon them, it is not a contract, although, as to some matters, they may be agreed. *Id.*, 650
12. Where it was sought to compel the specific performance of a parol agreement to assign in trust, for the benefit of the complainant and five other creditors, the defendant's interest under a will, and it appeared that at the interview during which the alleged parol agreement was entered into, the terms and conditions of the assignment were in a measure, but not entirely, ascertained; it being understood at that time that the assignee

Specific Performance—Continued.

was to pay the creditors first, and then reconvey the remainder to the assignor, but as to provision for the defendant's own support out of that interest, and his release and discharge from those creditors' claims no agreement was reached; and afterwards the defendant, using a form drafted for him by the creditors, containing such provision, prepared, signed and sealed an instrument of assignment, and at the instance of one of the creditors omitted therefrom all such provision, but refused to deliver the instrument, on the ground that such provision was first to be made, and the creditors to release and discharge him from their demand—*Held*, that there is no such contract established between the complainants and defendant as a court of equity can and will perform by its decree. *Id.*, 650

13. In such case there was no delivery of the deed of assignment, and, therefore, the suit cannot be maintained as a proceeding to obtain possession of a deed or muniment of title. *Id.*, 650
14. What acts or words shall constitute a delivery must depend upon the circumstances of each case. *Id.*, 650
15. A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere. *Id.*, 650
16. The proposal made by the defendant was, as to all the creditors named, an entirety, and was not capable of severance. *Id.*, 650
17. The failure of a part of the creditors to agree to a condition embracing all would be a total, not a partial, failure to accept such conditions. *Id.*, 650
18. A devise of rents arising out of the residue of the testator's real estate, which the executors were authorized and directed to sell, is an interest in lands within the statute of frauds, and its transfer must be evidenced by a note or memorandum signed by the party to be charged therewith. *Id.*, 650
19. In order to enforce the performance of a contract within the statute of frauds, on the ground of part performance, (1) the parol agreement relied on must be certain and definite in its terms; (2) the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; (3) the agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. *Id.*, 650
20. The assignment in this case cannot be regarded as the written memorandum required by the statute of frauds, because it was not delivered. *Id.*, 650

See TRUSTS, 1; FRAUDS AND PERJURIES.



Statutes.

1. A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within its letter. *McGregor v. Home Ins. Co.*, 131
See **APPEAL**, 3.

Statutes of Great Britain.

- 22 and 23 Car. II., c. 19*, 521
1 Geo. IV., c. 119, 296
7 Geo. IV., c. 57, 297
15 and 16 Vict., c. 86, § 44, 247

Statutes of New Jersey (Private).

- Camden Horse R. R. Co.*, 1866, p. 640, 270
Central R. R. of N. J., 1847, p. 133, 129
Colgan, Ann, relief of, 1836, p. 320, 179
New Jersey Midland R. R., 1871, p. 1030, 123
Oxford Iron Co., P. L. 1859, p. 377, 198
Town of Bergen, P. L. 1864, p. 420, 627
United Companies R. R., 1869, p. 1026, 125

Statutes of New Jersey (Public).

- Assignments*,
Rev. p. 38, § 8, 200
Rev. p. 37, § 5, 261
Rev. p. 36, 259
Chancery,
Rev. p. 117, § 74, 391
Rev. p. 124, § 103, 463
Rev. p. 117, § 41, 573
Rev. p. 118, § 76, 439, 210
Rev. p. 120, § 86, 307
Corporations,
Rev. pp. 136, 177, § 3, 162
Rev. p. 191, § 80, 186
Rev. p. 196, § 103, 159
Rev. p. 195, § 99, 161
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Costs, P. L. 1879, p. 103, 62
Evidence,
Rev. p. 378, § 3, 5
P. L. 1880, p. 52, 5
Mortgages,
Rev. p. 708, § 32, 449
Rev. p. 706, 45
P. L. 1880, p. 255, 437
Municipal Corporations—Bayonne, 1869, p. 398; 1873, p. 469, 130
1872, p. 686, 131
Hoboken, 1859, p. 433, 28
Newark, 1868, p. 1002, 549
1857, p. 166, 550
Rahway, 1865, p. 499; 1874, p. 475, 402
Somerville, 1863, p. 479, 3

Statutes of New Jersey (Public)—Continued.

Orphans Court,	<i>Rev. p. 777, § 115,</i>	237
	<i>Rev. p. 781, § 129,</i>	250
	<i>Rev. p. 756, §§ 19, 20,</i>	533
	<i>Rev. p. 775, § 105,</i>	621
Passaic Drainage,	<i>1868, p. 1181,</i>	585
Railroads,	<i>Rev. p. 929, § 101,</i>	166
Roads,	<i>Rev. p. 1009, § 70,</i>	276
Sale of Infants' Lands,	<i>Rev. p. 1052,</i>	47
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Taxes,	<i>1879, p. 340,</i>	416
Title,	<i>Rev. p. 1189,</i>	549
Trustees,	<i>Rev. p. 1224, § 1,</i>	27

Sureties.

See EXECUTORS, 2.

T.

Taxes.

1. It is a universal principle that a purchase, at a tax sale by one whose duty it was to pay the taxes, shall operate only as an extinguishment of the tax. One man can acquire no rights against another by a neglect of a duty which he owes to the other. *Foley v. Kirk*, 171
2. The provision of the act of 1879 (*P. L. of 1879 p. 340*) that taxes thereafter assessed should be a lien on the premises paramount to any alienation &c. thereof, makes such lien prior to that of a mortgage on the lands given before 1879, and is within the power of the legislature. *Lydecker v. Palisade Land Co.*, 415

See MUNICIPAL CORPORATION, 2; USURY, 3.

Tenant for Life.

See WASTE.

Tender.

A judgment creditor of a mortgagor, who had been made a party defendant to a bill to foreclose a mortgage (a prior lien on the premises), before answering, and with intent to redeem the mortgage, tendered the complainant the amount due thereon, together with the accrued interest and taxed costs, which he, without objecting to the amount of costs, refused to accept.—*Held*, that his conduct was obstructive and vexatious, and that he must pay the costs of a cross-suit to redeem, although it appeared that the costs of notice to an absent defendant in the foreclosure suit were unknown to the clerk, and had not been taxed or tendered. The judgment creditor, however, was decreed to pay those costs. *Hendee v. Howe*, 92

Time.

See ASSIGNMENT, 1; JURISDICTION, 4; LACHES.

Title.

See SPECIFIC PERFORMANCE, 5; TAXES, 1; TRUSTS, 1.

Trusts.

1. A trust to sell or improve lands; to invest and re-invest the proceeds; to collect rents and income; to pay taxes, assessments, commissions, and other annual expenses and charges; to pay over the net income, and to divide the estate, vests a fee simple title in the designated trustees, not limited to the lifetime of the donor's children, which trust descends to the heir at common law, the eldest son of the survivor of the trustees, and his contract to sell lands of the estate may be specifically enforced. *Zabriskie v. Morris and Essex R. R. Co.*, 22
 2. A valid trust of personal property may be created by mere spoken words, and proved by parol evidence. *Danser v. Warwick*, 133
 3. A valid trust of a mortgage debt may be created by parol, for though a trust thus created will not pass any interest in the land held in pledge, yet it is good as to the debt, and will entitle the *cestui que trust* to the payment of his debt out of the proceeds of the sale of the land. *Id.*, 133
 4. A resulting trust in lands claimed from the payment of the purchase-money thereof, either by the complainant alone or in common with others, will not be raised against the consideration clause of the deed, and after great delay on complainant's part, except by clear proof. *McKeown v. McKeown*, 384
 5. A trustee was, by a will, clothed with extensive discretionary powers, and there was no provision for succession in the trust in case of his failure to act. He died.—*Held*, that this court would execute the trust through a successor to be appointed by it, and by substituting equitable rules in the place of arbitrary power. *Weiland v. Townsend*, 393
- See CORPORATION, 7; HUSBAND AND WIFE, 1.

U.**Ultra Vires.**

See CORPORATION, 4-6; LIEN, 1.

Undue Influence.

1. The question whether an act is the product of undue influence or not, must always be largely controlled by the state of health and condition of mind of the person alleged to have been unduly influenced. *Haydock v. Haydock*, 494

Undue Influence—Continued.

2. Whatever destroys free agency, and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, whether the control be exercised by physical threats, importunity or any other species of mental or physical coercion. *Id.*, 494

3. Undue influence is not measured by degree or extent, but by its effect; if it is sufficient to destroy free agency, it is undue, even if it is slight. *Id.*, 494

See WILLS, 2, 4.

Usury.

1. A purchaser of the mere equity of redemption, in premises covered by a usurious mortgage, who purchases subject to the lien of the mortgage, cannot set up usury as a defence. *Pinnell v. Boyd*, 190

2. Usury may be set up by the owners of the premises and by subsequent encumbrances, under the petition of the holder of a mortgage for the surplus money remaining in this court after satisfying prior mortgages. *Hutchinson v. Abbott*, 379

3. A promise by one of the mortgagors to the assignee, made after the assignment, to pay the interest on such mortgage promptly, does not estop him from setting up usury in the principal or in the interest previously paid; nor does a claim by one of the mortgagors, to have the full amount of such mortgage deducted by the assessor from the taxes on the premises, amount to an estoppel. *Id.*, 379

4. A mortgage was given in 1871, to a partnership firm, payable in ten years. In 1875 the firm assigned it to the complainant, as collateral security for their note.—*Held*, that usury, taken by the complainant from the partners on their note, could not be set up as a defence by the mortgagor on foreclosure. *Stevens v. Reeves*, 427

5. Where the mortgagor and the second mortgagee have a right to set up the defence of usury against the first mortgage, a sheriff selling the land on foreclosure of the second mortgage, does not, by conveying *subject* to the first mortgage, deprive the purchaser of the right to set up the same defence. The sheriff has no power to waive the usury. *Pinnell v. Boyd*, 600

V.**Vendor and Vendee.**

See FRAUDULENT CONVEYANCE, 4; SET-OFF; SPECIFIC PERFORMANCE.

W.

Waiver.

See AGENT, 1; CORPORATION, 12; USURY, 3, 5.

Waste.

1. A life tenant has a right to use a mine for his own profit where the owner of the fee, in his lifetime, opened it, even though he may have discontinued work upon it for a long period of years. A mere cessation of work, for however long a period, will not defeat the life tenant's right, but an abandonment for a day, with an executed intention to devote the land to some other use, will be fatal to the claim of the life estate. *Gaines v. Green Pond Iron Mining Co.*, 603
2. New shafts may be sunk upon veins of ore which had been opened. *Id.*, 603

Wills.

1. A testator was eighty-two years old in 1873, when he made his will.—*Held*, that if it be conceded that he was miserly, squalid, dishonest, profane and irascible; that he canceled a codicil to his will merely because he believed the beneficiary named therein, who was not a relation, was insincere towards him; that, in 1860, he revoked a trust deed in the nature of a testamentary disposition of his property (it appearing that he believed that he had, by its provisions, retained power to do so); that, in 1867, he revoked an absolute gift of certain stocks; and that he gave the bulk of his estate to his executors in trust to reduce the debt incurred by the United States in subduing the rebellion—he having no legitimate kindred who might, by the creation and execution of such trust, be disinherited or disappointed in their natural expectations—those things did not establish testamentary incapacity. *Lewis's Case*, 219
2. The evidence in this case—*Held*, to show testamentary capacity on the part of a testatrix eighty-one years old, and that no undue influence had been exerted over her by her daughter, with whom she and her husband had lived for more than twenty-two years, although such daughter received, by the will, a larger share of the estate than her sisters, and notwithstanding such daughter and her husband had received compensation for taking care of testatrix's husband, who died before testatrix, from his estate. *Kise v. Heath*, 239
3. The testamentary capacity of a testatrix who executed her will in the later stages of pulmonary consumption, established against the hypothetical opinions of experts as to the effect, upon the mind, of the medicines usually employed in such cases. *Andrews's Case*, 514

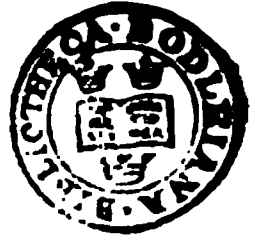
Wills—Continued.

4. The charge of undue influence exerted on testatrix by her mother, her sole legatee and executrix, held not to be sustained, it appearing that testatrix had been obliged, by her husband's cruelty, to leave him and return to her parent's house; and that testatrix also desired her mother to have the care and custody of her infant, in preference to its father. *Id.*, 514.
5. The testamentary capacity of a testatrix eighty-three years of age when her will was executed, who mentioned twenty of her intended legatees to her scrivener, and noted the omission of one of them when he read the will over to her, supported by the testimony of the surviving attesting witness and scrivener of her will, and by her physician and other witnesses, established, although her forgetfulness in regard to some minor matters was shown, and it appeared that she had made an unjust and unfounded accusation against a person who, however, had no natural claims upon her bounty. *Merrill v. Rush*, 537

See COSTS, 5-7; PRACTICE, 2.

Words.

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| "Exhibiting," <i>Ellison v. Lindsley</i> , | 260 |
| "Presenting," <i>Id.</i> , | 260 |
| "Similar cases," <i>Smith v. Newark</i> , | 551 |



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